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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 124

LONNIE AVERY, PETITIONER,

vs.

THE STATE OF ALABAMA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

PETITION FOR CERTIORARI FILED JUNE 20, 1939.

CERTIORARI GRANTED OCTOBER 16, 1939.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [Caption omitted]

IN CIRCUIT COURT OF BIBB COUNTY

INDICTMENT—Filed Oct. 4, 1934

The Grand Jury of said County charge that, before the finding of this indictment, Lonnie Avery, unlawfully and with malice aforethought, killed Caroline Avery, alias Carolina Avery, by shooting her with a pistol.

Against the Peace and dignity of the State of Alabama.

J. H. James, Solicitor of 4th Judicial Circuit.

No. 77. The State of Alabama vs. Lonnie Avery; Charge, Murder, First Degree; No Prosecutor: Witnesses: Lewis Snead, Will Bradley, Malinda Bradley.

A True Bill. W. R. Young, Foreman of the Grand Jury.

Filed in open court on the 4th day of October, 1934, in the presence of the Grand Jury. Marie Waller, Clerk.

[fol. 2] IN CIRCUIT COURT OF BIBB COUNTY

ARRAIGNMENT—March 21, 1938.

The defendant, being personally present in open court and having no attorney, it is ordered by the Court that Fred Wood and John Foshee, practicing attorneys of the Bibb County Bar, be and they are hereby appointed to represent the defendant in this case.

The defendant and his attorneys, Fred Wood and John Foshee being in open Court, and the defendant being duly and legally arraigned, pleads "Not Guilty", and not Guilty by reason of insanity, whereupon it is ordered by the Court:

1. That Wednesday, March 23, 1938, be and hereby is set for the trial of this case.

2. That the sheriff summon 62 jurors for the trial of this case, including the regular jurors drawn for the week of the trial.

3. That the names of 2 jurors be drawn from the jury box, who, together with the 60 regular jurors drawn for

the week in which this case is set for trial, shall be those allowed for the trial of this case. And thereupon the presiding Judge of said Court in open court in the presence of the defendant and his attorneys, in accordance with the law, in such cases made and provided, drew from the jury box of Bibb County, Alabama, the names of 2 jurors to complete the venire fixed and allowed for the trial of this case.

4. That a list of all said jurors, regular and special, together with a copy of the indictment, be forthwith served on the defendant by the Sheriff.

5. That the same jurors allowed for the trial of this case be allowed and designated for the trial of each other capital case set for the same day.

[fol. 3] IN CIRCUIT COURT OF BIBB COUNTY

SPECIAL VENIRE DRAWN AND ALLOWED FOR THE TRIAL OF THE CASE OF THE STATE OF ALABAMA VERSUS LONNIE AVERY, AND THE SHERIFF'S RETURN SHOWING SERVICE OF A COPY OF THE INDICTMENT ON THE DEFENDANT

[Title omitted]

No.	Name	Beat	Occupation	Residence
1	R. E. Hardman	1	Ore Worker	Woodstock
2	P. M. Stephens	1	Farmer	Woodstock
3	T. S. Lewis	2	Farmer	West Blocton R2
4	Hester Lewis	2	Farmer	West Blocton
5	Leonard Hubbard	2	Farmer	West Blocton
6	Renfro McBride	3	Farmer	Brent RT
7	David Johnson	3	Teacher	Brent
8	Earnest C. Belcher	3	Farmer	Brent
9	Hardin Hunt	4	Farmer	Centreville Rt
10	J. Cross Steele	4	Merchant	Brent
11	Hullett Stewart	4	Farmer	Centreville
12	Willard T. Bamburg	4	Farmer	Brent Rt
13	Clifton G. Nichols	4	Farmer	Brent
14	V. A. Hunt	4	Druggist	Brent
15	R. Eddie Thompson	4	Farmer	Centreville
16	G. C. Elam	4	Farmer	Brent
17	Jesse D. Parker	4	Carpenter	Centreville Rt
18	Henry P. James	4	Farmer	Brent Rt
19	Herbert H. Murphy	4	Farmer	Brent Rt

No.	Name	Beat	Occupation	Residence
20	J. F. Meigs	5	Farmer	Centreville
21	Joe Suttle	5	Truck Driver	Centreville
22	J. P. Nix	5	Barber	Centreville
23	Frank Lightsey	5	Farmer	Centreville
24	C. A. Lee	5	Farmer	Centreville
25	Judson D. Perkins	5	Farmer	Centreville Rt
26	James Harris	6	Miner	Marvel
27	E. H. Langston	6	Farmer	Centreville
28	Thomas H. Fancher	6	Miner	Piper
29	Wilburn W. Busby	6	Blacksmith	Marvel
30	Claude Pilgreen	6	Miner	Coleanor
31	Alexander Hayes	6	Miner	Marvel
32	Christo J. Hayes	6	Miner	Piper
33	Edwin Davis	6	Clerk	Piper
34	Jefferson Liddle	6	Miner	Marvel
35	A. C. Caldwell	6	Farmer	Piper
36	Raymond Hayes	6	Farmer	Centreville Rt
37	J. E. Smitherman	6	Miner	Marvel
38	J. W. Edwards	7	Farmer	Lawley
39	John Will Hicks	7	Farmer	Lawley
40	I. H. Hicks	7	Farmer	Lawley
41	Sam Cummings	7	Farmer	Randolph
42	J. P. Edwards	7	Farmer	Lawley Rt
43	John Cummings	7	Farmer	Randolph
44	H. R. Belvin	7	Farmer	Randolph
45	O. B. Edwards	7	Farmer	Lawley
46	B. H. Smitherman	7	Farmer	Centreville RT
47	John M. Battles	8	Merchant	Ashby RT
48	Paul Pratt	9	Farmer	West Blocton Rt
49	C. W. Mize	10	Carpenter	West Blocton
50	G. C. Frederick	10	Minister	West Blocton
51	M. T. Smith	10	Merchant	West Blocton
52	Sam V. Morse	10		West Blocton
53	Wilcox Randle	10	Oil Dealer	West Blocton
[fol. 4]				
54	R. B. Seales	10	Miner	West Blocton
55	J. H. Daniels	11	Miner	West Blocton
56	Virgis Ashworth	11		West Blocton
56	J. D. Muse	11	Contractor	West Blocton
58	Victor W Steele	13	Farmer	West Blocton
59	A. A. Hyde	14	Miner	West Blocton
60	Joe Lucas	14	Miner	Belle Ellen
61	Heber Caddell	3	Farmer	Brent
62	C. A. McIntosh	5	Merchant	Centreville Rt

Endorsed: I, R. J. Gardner, Sheriff of Bibb County, Alabama, hereby certify that I served a copy of the within List of Jurors and a copy of the Indictment against Lonnie Avery on the said Lonnie Avery on the 21st day of March, 1938, at 2:00 P. M.

R. J. Gardner, Sheriff.

[fol. 5] IN CIRCUIT COURT OF BIBB COUNTY

[Title omitted]

MOTION FOR CONTINUANCE—Filed March 24, 1938

Now comes the defendant, Lonnie Avery, by his attorneys, John Foshee and J. Fred Wood, and moves the Court to continue said cause and as grounds for said motion sets down and assigns the following separately and severally, to-wit:

1. The attorneys for the defendant were appointed by the Court to represent the defendant in said cause on, to-wit, March 21, 1938, and said cause was set for hearing and trial on, to-wit, March 23, 1938, and said attorneys have not had a reasonable time in which to prepare the case for trial.

2. The attorneys for the defendant were appointed by the Court and since their said appointment they have not had sufficient time to investigate the case, to search for available evidence in favor of the defendant, to study the law relative to the case and to adequately prepare the case for trial.

3. The attorneys for the defendant were appointed by the Court to represent the defendant on, to-wit, March 21, 1938, and on that date and each day since said attorneys have each had other cases in which they were attorneys for other defendants set for trial in said Court and have therefore been unable to leave the Court for the purpose of investigating the facts of this cause or to do anything toward the preparation of the cause for trial.

4. To require the defendant to go to trial or be put to trial upon this date and upon the day said cause is set [fol. 6] for hearing and trial denies to the defendant the right to be represented by attorneys or attorney.

5. This case is to be tried upon an indictment presented a Grand Jury of Bibb County, Alabama, and one entire day has not transpired after the case has been placed upon the trial docket of this Court.

6. The counsel for the defendant, who were appointed by the Court to represent the defendant on March 21, 1938,

have not had sufficient time in which to prepare and make defense in said cause.

7. The defendant is unable to employ counsel and is charged with a capital offense and counsel appointed by the Court on, to-wit, March 21, 1938, since said date have to be continuously engaged with other cases in said Court and have not had sufficient time to prepare and make defense in said cause.

8. To put the defendant to trial on the 23 day of March, 1938, is a violation of Section 5567 of the 1932 Code of Alabama.

John Foshee, J. Fred Wood, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 7] AFFIDAVIT OF JOHN FOSHEE

STATE OF ALABAMA,
Bibb County:

Before me, the undersigned authority, personally appeared John Foshee, who being by me first duly sworn to speak the truth, the whole truth and nothing bu- the truth, doth depose and say:

On Monday, March 21, 1938, I was appointed by the Circuit Court of Bibb County, Alabama, along with J. Fred Wood, another attorney, to defend Lonnie Avery in said Court on a charge of Murder. My appointment was made at the time the defendant, Lonnie Avery, was arraigned. The appointment and arraignment took place at about two P. M. O'clock, on March 21, 1938, March 23, 1938, was the date set for the trial of said Lonnie Avery. At the time I was appointed to defend Lonnie Avery I was going into the trial of another case. I was engaged in this case until about 9:00 P. M. O'clock, March 21, 1938. I had other cases on the docket of said Court which required my presence in the Court Room on March 22, 1938. I have not had any time to find witnesses, for the defendant, Lonnie Avery, and interview them. I have not had the time at my disposal to study the law in this case and present a defense for Lonnie Avery. I have talked with and observed Lonnie

Avery, the Defendant, on one occasion since my appointment and from this observation and conversation I have serious doubts as to his sanity. I have not had an opportunity to have competent physicians to examine him as to his sanity. I have been informed and believe that Mr. J. Fred Wood, who was appointed to assist me in the defense of this case, has also been engaged in Court and has not had an opportunity to prepare a defense for Lonnie Avery. I am not now prepared to go into the trial of Lonnie Avery's case. I have not had sufficient time to prepare and make defense in this case. I was also detained in Court on March 23rd, 1938, waiting for Lonnie Avery's case to be called.

I am making this affidavit in support of a motion for a continuance of the cause of State of Alabama *v.* Lonnie Avery, now pending in the Circuit Court of Bibb County, Alabama, which Mr. J. Fred Wood and myself have filed in said cause and presented to the Court.

John Foshee.

Subscribed to and sworn to before me in this the 24 day of March, 1938. Marie Waller, Clerk Circuit Court Bibb Co. Ala. Filed in office March 24, 1938. Marie Waller, Clerk.

[fol. 8] AFFIDAVIT OF J. FRED WOOD

STATE OF ALABAMA,
Bibb County:

Before me, the undersigned authority, personally appeared J. Fred Wood, who, being by me first duly sworn to speak the truth, the whole truth and nothing but the truth, doth depose and say:

On Monday, March 21, 1938, John Foshee and I were appointed by the Circuit Court of Bibb County, Alabama, to represent and defend Lonnie Avery in said Court on a charge of murder. Our appointment was made at the time the defendant, Lonnie Avery, was arraigned. The appointment and arraignment took place on the afternoon of March 21, 1938, at about two o'clock. The date set for the trial of the said Lonnie Avery was to-wit, March 23, 1938. At the time we were appointed to defend the said Lonnie Avery, the Spring Session of the Criminal Court of the

Circuit Court of Bibb County, Alabama, was in session. I had been employed by other defendants to represent them in said Court which was at that time in Session. I had cases set for trial on Monday, March 21, 1938, but some of those cases were not disposed of and were carried over to the following day, and my last case was disposed of about 4:30 o'clock on the afternoon of March 22, 1938. Having those cases in Court it was necessary for me to remain in Court until my last case was disposed of that was set for trial on the days of March 21 and 22, 1938. I have not had the opportunity to study the facts or law in order to prepare a defense for the said Lonnie Avery, and I am not prepared at this time to go into the trial of the said Lonnie Avery's case. I have not had sufficient time to perpare and make a defense in this case. I was also detained in Court on March 23, 1938, waiting for Lonnie Avery's case to be called for trial.

I am making this affidavir in support of a motion for a continuance of the case of State of Alabama vs. Lonnie Avery, which is set for trial on March 28, 1938, in the Circuit Court of Bibb County, Alabama, which said motion has been filed by John Foshee and myself in said cause and presented to the Court.

J. Fred Wood.

Subscribed to and sworn to before me on this the 24 day of March, 1938. Marie Waller, Clerk of Circuit Court Bibb County, Alabama.

Filed in Office, March 24, 1938. Marie Waller, Clerk.

[fol. 9] IN CIRCUIT COURT OF BIBB COUNTY

VERDICT AND JUDGMENT—March 24, 1938

Came the State of Alabama by its Solicitor and the defendant, Lonnie Avery, in his own proper person and by and with his attorneys, and, being arraigned in open court upon the indictment in this case, the defendant pleaded "Not Guilty" and interposed the special plea of not guilty by reason of insanity. By leave of the Court, the defendant withdraws his special plea of not guilty by reason of insanity, and issue being joined:

Thereupon came a jury of twelve good and lawful men, to-wit:

1. Christo J. Hayes	7. Joe Suttle
2. Wilburn W. Busby	8. J. P. Nix
3. I. H. Hicks	9. B. H. Smitherman
4. Judson D. Perkins	10. O. B. Edwards
5. Edwin Davis	11. Frank Lightsey
6. J. E. Smitherman	12. Claude Pilgreen

who having been elected and duly sworn according to law, on their oaths say: "We, the jury find the defendant guilty of murder in the first degree as charged in the indictment and fix his punishment at death."

It is therefore considered and adjudged by the Court that the defendant is guilty of murder in the First Degree, as charged in the indictment.

[fol. 10] IN CIRCUIT COURT OF BIBB COUNTY.

SENTENCE—March 24, 1938

And now on this day, to-wit, March 24, 1938, the defendant, Lonnie Avery, being again present in open Court in his own proper person and with his said attorneys, and being asked by the Court if he has anything to say why the sentence of the law should not now be pronounced upon him, says nothing.

It is therefore adjudged and considered by the Court, and it is the order, sentence and judgment of the Court, that the defendant at the Bar, the said Lonnie Avery, as a punishment for the offense of which he has been convicted by the jury, and of which he has been adjudged guilty by the Court, be put to death on Friday, May 13th, 1938, and before sunrise on said day, by electrocution, at the place, in the manner and made required by law, and that this sentence of death be executed by the proper person designated by law to execute the sentence of death upon convicts, by causing to pass through the body of the defendant a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of said defendant until the defendant is dead.

And before passing sentence, the Court proceeded to ascertain by examination of the defendant under oath, and other evidence, that the defendant is of the male sex, negro race, is by way of occupation a laborer, that he is about 32 years of age and that his health is good.

The name and post office address of his nearest relative is John Thomas Avery, Brent, Alabama, Post office Box 15.

The defendant, Lonnie Avery, having reserved questions of law for the consideration of the Supreme Court, and having taken an appeal to the Supreme Court from said judgment and sentence, and the defendant desiring the execution of said sentence suspended pending said appeal, it is therefore ordered by the Court that the said appeal to the Supreme Court be granted and allowed to the defendant, and it is further ordered by the Court that the execution of said sentence be, and the same is hereby suspended to await the action of the Supreme Court on the appeal in this case.

[fol. 11] IN CIRCUIT COURT OF BIBB COUNTY

[Title omitted]

MOTION FOR NEW TRIAL—Filed March 24, 1938

Now comes the defendant in the above styled cause and moves the Court to arrest and set aside the verdict heretofore rendered in said cause and grant the defendant a new trial in said cause and as grounds for said motion sets down and assigns the following, separately and severally, to-wit:

1. The verdict was contrary to the evidence in this case.

2. The verdict is contrary to the evidence in this cause.

3. The verdict is contrary to the law applicable to this case.

4. The verdict is contrary to the law and evidence in this case.

5. The Court erred in refusing the motion of the defendant for a continuance.

6. The Court erred in refusing to grant the motion of the defendant for a continuance of the cause.

7. The Court should have granted the motion of the defendant for a continuance of said cause.

8. The Court abused its discretion in refusing to grant the motion of the defendant for a continuance of said cause.

L. S. Moore, J. Fred Wood, John Foshee, Attorneys for Defendant.

[File endorsement omitted.]

I accept service of copy of this Motion March 23, 1938.
J. H. James, Solicitor.

This motion presented to me this March 23, 1938 and is set down for hearing at Centerville, Ala., on April 16, 1938,
Jno. Miller, Judge.

[fol. 12] On this the 16th day of April, 1938, this Motion is continued to May 9th, 1938.
Jno. Miller, Judge.

On this May 9, 1938, this motion is continued to June 6, 1938.
Jno. Miller, Judge.

On this June 6th, 1938, this Motion is continued to June 30, 1938.
Jno. Miller, Judge.

ORDER OVERRULING MOTION

On this June 30, 1938, this Motion with Amendment submitted and argued and upon consideration of it and the evidence, it is denied and overruled, and Defendant excepts to the ruling of the Court.
Jno. Miller, Judge.

[fol. 13] IN CIRCUIT COURT OF BIBB COUNTY

[Title omitted]

AMENDMENT TO MOTION FOR NEW TRIAL—Filed June 30, 1938

Now comes the defendant in the above styled cause, and with leave of the Court first had and obtained, amends his

motion for a new trial heretofore filed in said cause by adding thereto the following grounds for said motion, to-wit:

9. The defendant was denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to The Constitution of the United States of America, specifically as follows: the defendant was not given a fair, impartial and deliberate trial.

10. The defendant was denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America, specifically as follows: The defendant was denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial.

11. The defendant was denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America specifically as follows: (1) The defendant was not given a fair, impartial and deliberate trial; and (2) the defendant was denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial.

12. The defendant was denied due process of law in contravention of The Fourteenth Amendment to the Constitution of the United States of America.

13. The defendant was denied equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States of America.

L. S. Moore, John Foshee, J. Fred Wood, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 14] IN CIRCUIT COURT OF BIBB COUNTY

[Title omitted]

Bill of Exceptions—Filed September 21, 1938

Be it Remembered, that on to-wit: the 24th day of March, A. D. 1938, upon the trial of the above entitled cause in the

said court, at the place of holding same, before the Hon. John Miller, Judge of the Circuit Court, then and there presiding, with the jury duly empanelled, the following proceedings were had, to-wit:

WILL BRADLEY, a material witness for the State, being first duly sworn, testified as follers:

My name is Will Bradley. I live in West Virginia. I livid in Bibb County, Alabama, in 1934, near the Bibb and Perry County line. I knew Caroline Avery in her lifetime. She is now dead and I saw her killed. Lonnie Avery, the Defendant at the bar killed her in February 1932. I saw the killing. It happened in Bibb County, Alabama. Caroline Avery was not my sister, she was my adopted child and I had raised her. She was killed in the day time. She was living at my home at that time. She was the wife of Lonnie Avery. He had been living with her immediately before that, up to a couple of months before that time. She was, at that time, living at my home, but he was not. On the day she was killed, she left my house to go to Louis Snead's to get a tub to wash in. Louis Snead's house is about two hundred and fifty yards from my house. After she left my house, and before she got to Louis Snead's house, I heard her voice telling Lonnie that she would go back if he didn't kill her. I looked that way and her hands were up this way. He was facing her and she was facing him. He had a pistol in his right hand. I did not hear him say anything to her when she said that, but she broke to run. When she broke to run, he fired at her twice. She turned round and made two or three steps toward him and fell on her face. He approached her then and stood above her and shot twice across her. She was still lying on her face. Then he walked back of her and fired a shot back here, in the back of her head. I hollered at him then and asked what he was doing and he broke and run. I could see him. I didn't see him again until the past Monday. He hasn't been down in this section since [fol. 15] then. After he ran off, I went up to where my daughter was. She had some wounds on her body. One was in her head, one through her left ear and then one in her left shoulder, just below the shoulder blade. I looked right down on the ground where she was lying. There were two bullet scars, on the ground, about that far apart. The two holes were about that size. They were about a foot from

her head. She had a wound in the back of her head and one below the shoulder blade in the back. She was dead.

Cross-examination:

At the time we looked up and saw Lonnie, he had a pistol. Caroline Avery had her hands in the air. I looked up and he shot her twice. Once in the ear and once in the back. Then he shot her twice more on the ground and she was lying on her face, and then he shot her in the back of the head. I was about seventy-five yards from her when he fired this last shot. From where I was standing I couldn't tell that that last bullet hit her in the head, but that is the way he shot, towards her head. I believe it went in her head. I know of my own knowledge that the bullet went in her head. I was seventy-five yards from her. I was about two hundred yards from Lonnie Avery and Caroline Avery when I saw them first. I heard Caroline Avery tell Lonnie Avery that she would come back if he wouldn't kill her. I was two hundred yards away and that is all I heard. Caroline Avery was not standing between me and Lonnie Avery at that time. Lonnie was between me and her. Lonnie's back was to me. I saw the gun in his hand. He was standing like this, and Caroline was over here. I could see the gun two hundred yards away. He had the gun, like this, at his side, where I could see it. This killing took place on February 13th, 1932, between Louis Snead's house and my house. The first time I saw Lonnie Avery that day was when he was standing there with the gun pointed at Caroline Avery. I have never heard Lonnie Avery make any threats toward Caroline Avery. At the time this shooting took place, Lonnie Avery and Caroline Avery were separated and were not living together as man and wife.

MALINDA BRADLEY, a material witness for the State, being first duly sworn, testified as follows:

My name is Malinda Bradley. I am Will Bradleys wife. I knew Caroline Avery in her lifetime, she was my adopted daughter. She is now dead. I saw the shots fired that killed her. At the time she got shot, I was in the edge of my yard. It was in the day time. She hadn't been long left

my house when the killing took place. She left there for [fol. 16] Louis Snead's house to get a tub and a bucket of water. If she had a weapon of any kind, I didn't see it. My husband called me and I went out in the yard. That was the first thing that attracted my attention before the shooting took place. The first thing I saw was Caroline and Lonnie Avery. Lonnie had his back to me and she was facing me. She had her hands up this way. They were facing each other. She said: 'Lonnie, I declare, I will go back if you won't kill me.' She turned then and commenced to running and he fired twice. She then ran a little piece and fell on her face. He walked around opposite to her and shot twice across her and then walked to her face and shot her once. When he shot the fifth time he pointed the pistol at the back of her head. He reached out this way when he shot the last time. Then he ran. Monday, here in the Court room, is the first time I saw that man after he ran.

Cross-examination:

I was in the house at the time my husband called my attention to this. I was in the yard at the time this shooting took place. I was in the edge of the yard, but I couldn't estimate the distance from me to Lonnie and Caroline. It wasn't very far. I did not go up towards where the shooting was taking place. I had gone only to the edge of the yard, when the shooting was over and Lonnie had gone. I could tell from where I was that Lonnie had a pistol in his hands and shot at her head. I could tell that Lonnie had a pistol in his hands when she had her hands up in the air, for I could see the pistol in his hands. He had his back towards me. I can't estimate the distance, even approximately. I can't point out anything around her that was about the distance, but it was not very far. I didn't see Lonnie and Caroline up there scuffling. The first thing I heard was my husband calling me. We were on Mr. D. Barker's land at that time. Mr. D. Barker lived in Marion. Louis Snead lived on the same place at that time. Lonnie Avery did not live around there at that time. Me and my husband and Louis Snead were all close neighbors there.

LOUIS SNEAD, a material witness for the State being first duly sworn, did testify as follows:

My name is Louis Snead. I live down here at Harrisburgs. I knew Caroline Avery. She is now dead. I saw her killed. I was living on Mr. Barker's place then. I saw this woman killed. The first thing I saw was Lonnie Avery and Caroline Avery standing in the road, and they stood there a couple of minutes and she started to run and said: "I'm going back" and Lonnie said: "No, hell, you ain't," and [fol. 17] then he shot twice and she fell and then he made two more shots and then he walked up to her feet and shot again, and then left running. He fired five shots all together. Today is the first time I have seen Lonnie Avery since that time. I haven't seen him around here since then, until today.

Cross-examination:

There were five shots fired. He shot two times and then two more times over her body and then walked around to her feet and shot again. He fired the fifth time at her head. I stood still and counted the shots while this was going on. I was about a hundred and fifty yards from this place, while the shooting was going on. I could see both of them. They were standing angling to me. One was this way and the other was this way, and I was standing where I could see both of them. I could see his side. Will Bradley was standing a little off from me and was not between me and Caroline and Lonnie. I was in a position at that time that the first shot was fired, to see the gun in Lonnie's hands. Nobody called my attention to this difficulty going on up there. No one told me to look that someone was going to get killed. I could see them standing up there. I saw this woman fall. This man run off. This woman started to run off and he shot her twice, and when she fell he shot twice over her body, and then walked around to her feet and shot her once in the head. That is the way I told it at first. When I first saw Caroline and Lonnie, they were standing there talking. They were talking a couple of minutes and Caroline said: "Yes, I am going back," and Lonnie said: "No, hell, you aren't". Then Caroline started to run and he shot her five times. He shot twice while she was running, and then she turned around. She fell on her face and he shot twice more, over her, and then after he shot those two, he walked around to her feet and shot. That is the same thing I repeated a few minutes ago. I am not related to Will Bradley and I am not related to Malinda Bradley.

Redirect examination:

I was standing a few steps away from Will Bradley's yard when I saw the shooting. I was not right with them. I was within a few steps of his yard. I am the Louis Snead who livid up there near them at that time. It was up towards my house that the shooting occurred. That was where the well was and where the tub was.

NEWT SUTTLES, a material witness for the State, being first [fol. 18] duly sworn, did testify as follows:

My name is Newt Suttles. I am a Deputy Sheriff of Bibb County. I know the defendant, Lonnie Avery. Here a short while ago I went somewhere for him.

Q. Where did you go to find him?

The defendant objected to this question on the grounds that it is immaterial to this case, is irrelevant and impertinent. Thereupon the Court overruled the objection of the defendant, to which ruling of the Court, the defendant duly and legally excepted.

A. To Pittsburgh, Pennsylvania.

I went to Pittsburgh, Pennsylvania, and brought him back. I heard him make the statement that his name was William Avery, when I got him.

At this point, the defendant objected to the testimony of the witness and moved to exclude the statement in regard to his name on the grounds that the witness had not been properly qualified, and on the further grounds that it was not pertinent to the facts in this case. Thereupon the Court overruled the objection of the defendant and the defendant duly and legally excepted to the rulings of the Court.

He denied coming from Bibb County, Alabama, saying that he did not know anyone here. He denied his name was Lonnie Avery. I was not a Deputy Sheriff at the time this killing took place. I did not go down there at the time this killing took place. I was gone from here at that time.

At this point the defendant moved to exclude all the testimony of the witness tending to show a confession, on

the ground that it has not been shown by this witness whether or not any threats were made, or hopes or inducements of reward held out to the defendant. The Court overruled the objection of the defendant, to which ruling of the Court, the defendant duly and legally excepted.

WILL BRADLEY, a material witness for the State, is recalled for further redirect examination:

I saw my daughter when she left the house. She did not have any weapons in her hands. I was the first person to get to her and I helped to pick her up. There were not any weapons in her hands.

Here the State rested its case.

LONNIE AVERY, a material witness in his own behalf, being first duly sworn, did testify as follows:

My name is Lonnie Avery, and I am the defendant in this [fol 19] case. I went down there that morning about ten o'clock. I met her and that Snead boy coming from over there. She had a rub board or something and a bucket of water. We began talking and she asked me about a letter a girl wrote and that she had. She got it out of her pocket. She had an automatic pistol under her sweater. I tried to take it away from her and the gun fired. I didn't have anything against her at all. The gun fired and she fell and I run. I had found one letter that some man had written her. We had been separated twice up until that time. We were not living together at the time I met her that day. When she started to pulling out that gun, she said me and you and this woman can't agree. She began drawing the gun out then and I grabbed it and we went to tussling over it, and it went off. This made the second time we had been separated. These letters and things we were fighting over were the cause of our separation. When that gun went off I held on to it and tried to get it away from her. As soon as the gun went off I turned and run. I turned and run as soon as I realized she was shot. I did not have a gun on me when I met her there. After she fell, I did not take the gun and turn around and shoot at her this way, and shoot at her before I run. It was purely an accident the way she got shot. I didn't have that gun in my

hand during the time we were tussling. She had it in her had I had hold of it and we were tussling and it went off. We were quarreling about my woman and her man. She did not say during the time we were scuffling: "If you just don't kill me, I'll come back", and I didn't say "No you won't" or words to that effect. Louis Snead is Malinda Bradley's first cousin, I think. They all lived close around there together. My wife was Will and Malinda Bradley's adopted daughter. She stayed at their house most of the time when she wasn't with me. You could see what was going on from Louis Snead's house, but he wasn't at home. He had gone on past me and Caroline up towards Will Bradley's house. He was not standing at his house when this thing happened. It was not possible to see us standing down there, from Will Bradley's house. There were some bushes that obstructed the view. This was out in the edge of the field. There was a path along there, with bushes all along there. There was some woods just below there. There were bushes between me and Will Bradley's house. From where I was I could see the top half of Will Bradley's house. I could see just about half of it; you couldn't see all of it.

Cross-examination:

Those were oak bushes. It was in February. There weren't any leaves on them. I am thirty-one years old. I did not come out of the bushes there where I saw my wife. I came up the path.

[fol. 20] Q. Where were you staying then?

The defendant objected on the grounds that it is incompetent, irrelevant and immaterial. The Court overruled the objection of the defendant, to which ruling of the Court the defendant duly and legally excepted.

A. I was staying on Mr. James' place about three miles from there.

I walked from home, I didn't go to Bradley's house. She wasn't there. I was going on up the road and I seen her coming from there. I did not go down there to see her. She was with the Snead boy. She had a wash board and he had the water. It was a wash-board she had. I went out there and commenced talking to her. That man went on towards Will's house. I did not pull the pistol out. I did not have the pistol. She had the pistol under

her sweater. I got to tussling with her over the pistol trying to take it from her. I shot her, behind the shoulder, and through the back, tussling with her. I don't know whether I shot her in the ear tussling with her. I don't know that I shot her in the back of the head tussling with her. I did not shoot two shots in the ground tussling with her. I lost that pistol in the swamp. I did not kill that woman when she had her hands up, backing off from me. She didn't have her hand up.

Q. Weren't you convicted in this very Court before, for assault with intent to murder?

The defendant objected to this question on the ground that any former case has nothing to do with this case. The Court, thereupon, overruled the objection of the defendant, to which ruling of the Court, the defendant duly and legally excepted.

A. Yes, sir.

Redirect Examination:

My wife used to carry my razor around; I had seen her with weapons before. She carried my razor around all the time. When I met her, I was on the way to Bradley's house to see her. I was not standing down there waiting for her. Since I met her, I didn't go down to Bradley's house. There were some pine bushes out there. A few pine trees and oak bushed scattered along there. Oak trees keep their leaves pretty late in the winter, B-ack jacks and little oak keep their leaves on them pretty late. There were bushes around there like that where this happened. I do not remember how many times the gun went off while we were scuffling. It went off more than once. It was an automatic, one that keeps shooting every time you pull the trigger.

Recross-examination:

[fol. 21] It will keep shooting every time you pull the trigger. I did not keep pulling the trigger. It wouldn't just shoot by itself, but I didn't pull the trigger, because I didn't have anything against her. Those oaks were the sort of oaks that kept their leaves on them part of the winter. I remember that there were some pines there too.

Here the defendant rested his case.

This was all the evidence introduced in the trial of this case.

During the argument of Hon. Joseph H. James, Solicitor for the State, he made a statement to the jury, which was in substance that the Deputy Sheriff was forced to go to Pennsylvania and get the defendant.

Counsel for defendant objected to this statement on the grounds that there is no testimony to show that the defendant had to be brought back from Pittsburgh, Pennsylvania.

The Court thereupon overruled the objection of the defendant's counsel, whereupon the attorney for Defendant duly and legally excepted to the ruling of the Court.

COURT'S ORAL CHARGE TO THE JURY

Gentlemen of the Jury, the defendant in this case, Lonnie Avery, is charged in this indictment, with the offense of Murder in the first degree. This indictment carries with it also, the offense of murder in the second degree. Two offenses are charged by this indictment. Murder in the first degree and murder in the second degree. Under the law, you gentlemen, I think now, it is your duty to determine from the evidence, what the facts of this case are. Then in doing that, you necessarily pass on the credibility of the witnesses—that is whether or not you will believe the witness or witnesses as they may testify, and then you weigh the testimony after it is given by the witness. Those are the three things which a jury alone can do in a criminal case. The Court has nothing to do with the facts; the Court has nothing to do with the credibility of the witnesses, and the Court has nothing to do with the weighing of the testimony. All the Court does is to pass on whether the testimony is competent, legal and relevant. After a witness testifies, then that testimony is entirely in your hands. You must determine what the facts of this case are from the testimony; then it becomes the duty of the Court to declare to the jury what is the law. The jury, then, must apply the law in the matter to the facts, to see whether or not the defendant is guilty of either one of these offenses or not guilty. [fol. 22] You must pass on the credibility of these witnesses and weigh the testimony you have heard, in the light of your good common sense, which you bring with you into the jury box.

Now, what is murder in the first degree? What is the law with respect to murder in the first degree? Well, the

law says, gentlemen of the jury, that murder in the first degree is the unlawful taking of human life, wilfully, with deliberation, premeditation and with malice. It becomes necessary for you, in this case, to apply the law to the facts to see whether or not this defendant has committed that offense. Now what does the law mean by the unlawful taking of human life. Human life may be taken in this State lawfully. The Sheriff can do it, under certain circumstances; and the warden at Kilby Prison takes human life lawfully every time he pulls the switch for somebody who is in the electric chair; every time the jury says that a defendant should suffer death in the electric chair, and the warden pulls the switch, at Kilby Prison, he has committed no offense, because he is doing what the law commands.

Now, was the death of this woman, Caroline Avery, caused by this defendant without the authority of the law, without any command of the law and without any mandate of the law; then did this defendant, when he shot Caroline Avery, if he did so, did he do that act wilfully; was it his fixed purpose at the time he shot her, if he did shoot her, to shoot her; was he governed at that time by his will? Did he fail to yield to the dictates of his reason? Was it a wilful act on his part? Then the second and third elements of murder in the first degree are that the act must have been deliberate and premeditated. Now, by those two terms deliberate and premeditated, the law means that this defendant, before he fired the shot or shots which took the life of Caroline Avery, that he intended to fire them before he did fire them, and that he intended that her death should follow therefrom.

Now, in order for deliberation and premeditation to be formed in a person's mind, the law doesn't fix any definite standard of time. It does not say any amount of days, or hours or weeks or months are necessary within which those two elements might be formed in the human mind. Deliberation and premeditation may be formed in the human mind in a second's time. The law says that if a defendant, before he takes human life has time to think, and does think, and does, as a result of his thinking, fire the fatal shot, that would constitute a sufficient time for these two elements to have been formed in his mind.

The last element of murder in the first degree is malice. What is malice? The law says that malice is the wilful doing [fol. 23] of a wrongful act, without any legal cause or justification therefor. If a defendant does a wrongful act, if he

does it wilfully; if there is no legal cause or justification for him doing that act, then the law says that that is a malicious act. But malice, gentlemen of the jury, is something that can't be seen. It is invisible; it is in the mind of man; and how, then, is a jury to get at whether or not the act of a defendant, if he did anything at all, is a malicious act. Well, the law says this; that if one person intentionally uses a deadly weapon and the death of another person follows therefrom, then the jury trying that person may infer the existence of malice from the intentional use of the deadly weapon, unless all of the facts and circumstances of the case rebut that presumption of the law. That is not a conclusive presumption of the law. One person may intentionally use a deadly weapon and another person may die therefrom, but that is not conclusive of malice. Self defense may rebut that, for that is one defense which rebuts that presumption of the law. That presumption of the law is not conclusive. A jury is not allowed to say that from the intentional use of a deadly weapon, where death results, that that is conclusive of malice, but the jury may infer it, unless all the facts and circumstances of the case rebut that presumption of the law.

Those, gentlemen of the jury, are the four elements of murder in the first degree.

This defendant, in order to be guilty of murder in the first degree, must have committed this homicide of Caroline Avery, unlawfully and wilfully, and with deliberation and with premeditation and with malice, in Bibb County, Alabama, and before this indictment was returned into Court. It doesn't make any difference, gentlemen of the jury, in a murder case, when the Grand Jury acts, provided it acts after the offense has been committed. There is not statute of limitations on murder. It is never out of date. If a murder was committed in Bibb County, Alabama, fifty years ago, or seventy five years ago, then the Grand Jury that meets here this Fall can act upon it. There is no limitation on it; it never dies as the result of the passage of time. It is of no concern, in this case as to when this indictment was returned into Court, except that it must have been returned into Court after the commission of the homicide. That is murder in the first degree. The burden of proof is on the State of Alabama in this case, as in every criminal case. The State is required to satisfy you from the evidence here, beyond a reasonable doubt and to a moral certainty

that this defendant, Lonnie Avery, in this County, Bibb, and before this indictment was returned into Court, wilfully and unlawfully, and with deliberation and premeditation and with malice killed Caroline Avery.

[fol. 24] Murder in the second degree, gentlemen of the jury, is the unlawful taking of human life, wilfully and with malice, but without any deliberation and without any premeditation—an unlawful taking of human life, wilfully and with malice. Those are the two offenses embraced in this indictment.

The defendant has plead not guilty and not guilty by reason of insanity, but with respect to that second plea of not guilty by reason of insanity, the Court will not charge you, the law in regard to that, in the absence of any evidence in regard to insanity. When the defendant put in his plea of not guilty, that is all the law requires him to do. He does not have to take the stand unless he voluntarily desires to do so—he may take the stand if he sees fit and testify like any other witness. When he says that he is not guilty, he denies that he is guilty of murder in the first degree; he denies, also, that he is guilty of murder in the second degree, and when he puts in that plea, there is no burden on him. He does not have to put up a single witness. He can sit and not say a word, if he so elects and desires. And the reason for that is the law presumes that he is innocent. That puts the burden of proof entirely on the State of Alabama. The law says to this man that he is presumed to be innocent and that presumption of innocense is to be regarded by you as evidence in his behalf, just as the testimony of any witness, and it stays with the defendant, until all the evidence satisfies you beyond a reasonable doubt and to a moral certainty that he is guilty, if it does so satisfy you, and then in that event, that presumption of innocence would no longer be of any benefit to this defendant, for the reason that it would have been overcome by the entire evidence. The Grand Jury indicted this man, but that is not evidence. The petit jury should never regard the indictment as any evidence—what the Grand Jury did has no bearing on his guilt or innocence, for it is not evidence. The indictment has brought him into Court today, and he has put in his plea, and when that is done, then the indictment has served its purpose.

Now this defendant says that he is not guilty, and that Caroline Avery met her death as the result of an accident;

that he is, therefore, not guilty of murder in the first degree and that he is not guilty of murder in the second degree, but that it was an accident.

Now, what is an accident. The law recognizes that people die accidentally, and if they di die accidentally, then the law doesn't hold any one responsible for the death of the party so dying. What is an accident? An accident, gentlemen of the jury, is when one person—you can say this defendant, since he has put in that plea, is engaged in the [fol. 25] doing of a lawful act, and while doing that act, he exercises due care, and there is no intent on his part to do any wrong, to do any harm, to do any injury, then if death follows from the doing of that act, then the law says he is not responsible; that it is a misfortune that happened. The law puts the burden on him, with respect to that, however. He must reasonably satisfy you, from all the evidence in the case that he was engaged in doing a lawful act, at the time, and that in doing that lawful act, he exercised due care; that is such care as an ordinarily prudent person would have exercised under the same circumstances or under similar circumstances and like conditions and that there was no intent on his part to do any injury to Caroline Avery.

You must determine from all this evidence whether the defendant was engaged in doing a lawful act at the time he says this woman Caroline Avery was attempting to draw a pistol from underneath her sweater, and that a scuffle followed or ensued and that he was trying to get the pistol, to keep from being shot by her.

The law permits any person to prevent the other person from doing him any harm. He had a right, if that be true, to try to get the pistol from her. Now, then, did he, then and there, exercise due care, such care as an ordinarily prudent person would exercise under similar circumstances and under like conditions, and was there any intent on his part to do Caroline Avery any injury. If you are reasonably satisfied from all this evidence that he was doing a lawful act, that he did exercise due care, and that there was no intent on his part to do her any injury, then that would constitute an accident. The law does not hold any person responsible to the law for any accident. It is for you gentlemen to determine whether an accident did take place.

The State of Alabama says that that was not true, that there was no accident, that it was an unlawful homicide committed by this Defendant under such circumstances as to constitute murder in the first degree or murder in the second degree, and that no accident took place, at all.

There is some evidence here tending to show that the defendant has been convicted of the offense of assault with intent to murder. That is before you wholly for the purpose of affecting the credibility of this defendant. We are not trying him here today for assault with intent to murder. He says that he was convicted of that offense. That is a felony which carries with it moral turpitude, and the law says that anyone that has been convicted of any offense, such as assault with intent to murder, involving moral turpitude, that that fact is allowed to go before the jury [fol. 26] to affect the credibility of his testimony. We are not trying him on that charge today, but the law allows that to go before you in order to affect the credibility of his testimony.

There is also certain testimony here tending to show that after this crime was committed, if it was committed, this defendant left Bibb County and several years afterwards was arrested in Pittsburgh, Pennsylvania. Flight, gentlemen of the jury, is what that testimony was introduced for. A defendant may flee from a sense of guilt or a defendant may leave the scene of the alleged homicide, the County of the alleged homicide, for some bona fide purpose. The fact, if it be a fact, that this defendant was arrested in Pittsburgh, Pennsylvania, and that he left Bibb County, and went there, doesn't necessarily go to show guilt on his part, but the jury may look at that fact, if it be a fact, as being a circumstance tending to show a sense of guilt on the part of the defendant. A defendant may leave bona fide, for business purpose, not connected at all with any criminal offense, but it is for you gentlemen to determine from all this evidence, as to why he left Bibb County after the alleged commission of this homicide.

Now, that is this case, gentlemen of the jury. It is an important case, both to the State and to this defendant, and a heavy duty rests on the shoulders of you jurors. I don't know of any duty, placed by law, on a citizen of this State, that is greater and more serious than that placed on the shoulders of a petit jury trying a defendant, charged with murder. It is serious, and it is sol-mn business. It is seri-

ous to the citizens of this State and it is likewise serious to this defendant. The State of Alabama and the defendant at bar are both deeply interested in the result of this case. Now you don't know the State of Alabama, and you don't know this defendant. You have been selected from this venire of jurors as being a fair and impartial jury, without any bias and without fear, favor, and will, from the evidence return a true verdict, whether it be for the State of Alabama, or whether it be for the defendant at the bar, doesn't worry you, or concern you one moment. You are here to administer the law as you find the law and the facts from the case.

Now the law says that if you are satisfied from all this evidence, beyond a reasonable doubt, and to a moral certainty, and if you have an abiding conviction in your minds that this defendant is guilty, then it is your duty to bring in a verdict accordingly. If you have a reasonable doubt as to this defendant's guilt, after you have considered all the evidence, or if you have a reasonable doubt arising from a want of satisfying evidence in the case, then the law says that you should give the defendant the benefit of that doubt and bring in a verdict of not guilty.

[fol. 27] If you are reasonably satisfied from this evidence that this woman, Caroline Avery, met her death accidentally at the hands of this defendant, then you should bring in a verdict of not guilty.

The punishment, gentlemen of the jury, for murder in the first degree is either death or imprisonment for life in the penitentiary, at the discretion of the jury. You have a discretion, either death or life imprisonment.

For murder in the second degree, the punishment is ten years in the penitentiary and any number above that that the jury sees fit to impose—the maximum is at your discretion.

For your convenience I have written out four verdicts and I don't want you to get the impression at all that I am suggesting in any wise what verdict you return, because I am not. I am only giving you a form for the four verdicts which you may return in this case. For murder in the first degree, there are two, one is death and the other is life imprisonment; for murder in the second degree, a form, and for not guilty, a form. Now don't get the idea at all that I am trying to intimate what verdict

you should return, because the Court has absolutely nothing to do with that.

Here are the four verdicts, which I shall read to you. If you find the defendant guilty of murder in the first degree, the form of your verdict will be: "We the jury find the defendant guilty of murder in the first degree, as charged in the indictment and fix his punishment at either death or life imprisonment."

If you find the defendant guilty of murder in the second degree, the form of your verdict will be: "We the jury find the defendant guilty of murder in the second degree as charged in the indictment, and fix his punishment at imprisonment in the penitentiary of this State for blank number of years.", ten years as a minimum and any number above that, that you see fit and proper.

In the event you should find the defendant not guilty, the form of your verdict should be: "We the jury find the defendant not guilty."

Those are the forms of the verdict. The defendant, gentlemen of the jury, -as asked the Court to give you a number of written charges. These charges are correct statements of the law, they are not in conflict with the oral charge of the Court and are to be taken by you gentlemen in connection therewith.

Upon the completion of the oral charge, the defendant's counsel objected to the Court furnishing forms for the ver-[fol. 28] dict of the jury, without including among them, a form for conviction for manslaughter.

The Court, thereupon, granted the defendant an exception to this portion of the oral charge.

Defendant's Requested Charges, Given

The Court then, gave at the request of the defendant, the following charges in writing:

No. 1. It is certainly the duty of the jury, in pronouncing on issues submitted to them, to consider and weigh all the testimony in the case. This does not mean that all, or any part of it, shall be believed. The law exacts no such rule as that. It must be considered, and given such weight as the manner of giving it in, its intrinsic nature, and the other testimony in the cause entitle it to. This much, and

nothing more, this the jury must and will do, as the only way of performing their highest, sworn duty of rendering a true verdict, according to the evidence, and the Court charges the jury that if, upon a consideration of all the evidence they have a reasonable doubt of the defendant's guilt, arising out of any part of the testimony they must find the defendant not guilty.

Given.

Jno. Miller, Judge.

No. 3. The Court charges the jury that, before they can convict the defendant they must be satisfied to a moral certainty, not only that the proof is consistent with the defendant's guilt, but that it is wholly consistent with every other rational conclusion; and, unless they are so convinced of his guilt, by the evidence beyond all reasonable doubt, they must acquit the defendant.

Given.

Jno. Miller, Judge.

No. 4. I charge you gentlemen of the jury, if there is a probability of the defendant's innocence arising out of the evidence in the case, you cannot convict the defendant.

Given.

Jno. Miller, Judge.

No. 5. The Court charges the jury that if you are reasonably doubtful as to the proof in this case of any material allegation in the indictment, then you must find the defendant not guilty.

Given.

Jno. Miller, Judge.

No. 6. I charge you gentlemen of the jury, that to justify your conviction of the defendant with any offense within the charge made within this indictment it is the duty of the State and on it rest- the burden thereof to satisfy you by competent evidence that the defendant is guilty beyond a reasonable doubt.

Given.

Jno. Miller, Judge.

[fol. 29] No. 7. The Court charges the jury that the only foundation for a verdict of guilty in this case is that the entire jury shall believe from the evidence beyond a reason-

able doubt and to a moral certainty that the defendant is guilty as charged in the indictment, to the exclusion of every probability of his innocence and every reasonable doubt of his guilt; and if the prosecution has failed to furnish such measure of proof and to so impress the minds of the jury of his guilt, they should find the defendant not guilty.

Given.

Jno. Miller, Judge.

No. 8. The Court charges the jury that a person charged with a felony should not be convicted, unless the evidence excludes, to a moral certainty, every reasonable hypothesis, but that of the defendant's guilt; no matter how strong the circumstances are, they do not come up to the full measure of proof which the law requires, if they can be reasonably reconciled with the theory that the defendant is innocent.

Given.

Jno. Miller, Judge.

No. 9. If after weighing and considering all the evidence in this case, one or more of the jurors feels that he desires more evidence before he or they can ever get an abiding conviction of the guilt of the defendant, then the juror has a reasonable doubt of the defendant's guilt, and the jury could not convict the defendant.

Given.

Jno. Miller, Judge.

DEFENDANT'S REQUESTED CHARGE, REFUSED

Counsel for the defendant, in the presence of the jury, and before the jury retired to consider the case requested the Court to give to the jury No. 2 in writing, as follows:

No. 2. The Court charges the jury that each and every one of you is entitled to have his own conception of what constitutes a reasonable doubt of the guilt of this defendant, that, before you can convict this defendant, the evidence must be so strong that it convinces each juror of the defendant's guilt beyond all reasonable doubt; and if, after a consideration of all of the evidence, a single juror has a

reasonable doubt of defendant's guilt, then you cannot find the defendant guilty.

Refused.

Jno. Miller, Judge.

And the defendant excepted to the action of the Court in refusing such charge.

VERDICT

The jury returned a verdict against the defendant as follows:

"We, the jury, find the defendant guilty of murder in [fol. 30] the 1st degree as charged in the indictment and fix his punishment at death."

J. E. Smitherman, Foreman."

Thereupon the defendant did on the 24th day of March, 1938, file a motion in the Circuit Court of Bibb County, Alabama, in the said cause of The State of Alabama against Lonnie Avery, to set aside the verdict and judgment in the said case, and to grant the defendant, Lonnie Avery, a new trial, which said motion the Court overruled and to which action of the Court, in overruling the defendant's said motion, the defendant excepted. The said motion, the several orders of the Court continuing the same, the order of the Court overruling the said motion and the evidence taken at the time of hearing said motion is as follows:

Motion for new trial omitted. Printed side page 11, ante.

[fol. 31] Amendment to motion for new trial omitted. Printed side page 13, ante.

[fol. 32] ORDER OVERRULING MOTION FOR NEW TRIAL

On this June 30, 1938, this motion with amendment submitted and argued and upon consideration of it and the evidence it is denied and overruled, and defendant excepts to the ruling of the Court.

Jno. Miller, Judge.

In connection with the above set out motion the Court examined Mr. John Foshee, one of the attorneys for the defendant, and upon said examination the said Mr. John Foshee did testify as follows:

"This defendant was arraigned on Monday, March 21st, and Mr. Fred Wood and I were appointed to defend him. The case was set for trial on Wednesday the 23rd of March. Neither Mr. Woods nor I had the clerk subpœna any witnesses for the defendant. The scene or location of the homicide was in the Harrisburg community, somewhere between nine and twelve miles. We turned off this side of Vernon Lewis's place; it is twelve or fifteen miles from Centreville. Neither Mr. Wood nor I went to the point of the homicide before Wednesday. We had cases set in Court all the week and one other reason was it was bad weather. It was raining and this place was off the regular well beaten road. It was in the woods and in rainy bad weather like it was at that time I doubt if you could get in there. I conferred with the defendant on Monday or Tuesday, with reference to any witnesses that might be su-pœnaed. The defendant gave me no witnesses' names. I would like to explain something in regard to that. The man is a negro and is illiterate and in my opinion he doesn't have the mind of an eight year old or even a six year old child. He couldn't give me any information that would help me. I made inquiries of people who live in the Harrisburg Community. I saw his brother on the morning of the day he went to trial and some more folks that day. His brother said he did not know anything about the case. I also interposed the plea of not guilty by reason of insanity, at the arraignment. There were three, no four, local doctors in Centreville at that time. I did not confer with any one of the four with reference to that special plea. These doctors here are country doctors and are not experts on mental [fols. 33-35] diseases. That negro is, at least, feeble minded, very much so. He is uneducated; he can't read and write and I know he is feebleminded. I wouldn't say how these doctors here could testify. I have been here three and a half years and I wouldn't say how they would testify to anyone's sanity. I did not have any subpœnaes issued for any lay witnesses with respect to that special plea; I did not have an opportunity to get out and hunt up any witnesses.

On Monday I had one or two criminal cases in Court. I was representing Huey Frederick. Neither of the two cases was tried that day. On Tuesday I was still waiting for the cases to come up. We tried one of the cases Tuesday, I know. There is a copy of the affidavit in the file. I have read Mr. Wood's affidavit, but if I read it again it might refresh my recollection some. I have forgotten about it now. I was trying to think who Fred represented here. If I had the affidavit I could give you the names of the cases. One of them was the Worrell case. I do not know when it was disposed of. I did not have an opportunity to get out and find any witnesses on either plea."

At this point the defendant re-introduced and re-filed the motion for a continuance and the affidavits of Hon. Fred G. Wood and Hon. John Foshee, in support thereof, which said motion and affidavits were first filed on the day of the trial, March 24, 1938, in support of the motion for a continuance.

Motion for continuance, omitted. Printed side page 5, ante.

[fol. 36] Mr. Fred G. Wood, one of the attorneys for the defendant, did testify on direct examination by Mr. L. S. Moore, as follows:

"I was appointed by the Court to defend Lonnie Avery on the charge of Murder; Mr. Foshee and myself were appointed. We received our appointment at the same time; that is the same time the defendant was arraigned, which was the 21 day of March, 1938, being Monday. I think I entered a plea for the defendant at his arraignment. I would answer that he was arraigned after my appointment. I also entered a plea of not guilty by reason of insanity, along with the plea of not guilty; two different pleas. The case was set for hearing on March 23, 1938, being Wednesday of the week of our appointment. Monday of that [fol. 37] week was the beginning of our criminal week of court. Cases were set for trial continuously from Monday morning on through Wednesday. I had another case in Court in which I had been regularly employed as counsel for the defendant. Some of those cases were set for trial on Monday of that week. To the best of my knowledge I think some of the cases were set for trial on Tuesday of that week. Some of my cases were not disposed of on Mon-

day and were carried over into Tuesday and Wednesday. These required my presence in the Court room. Court convened, to the best of my recollection, about nine o'clock on Tuesday morning. It convened about the same time on Wednesday. Some of the cases were carried over for trial on Thursday of that week; several cases were. This case was not tried on Wednesday. It was carried over from Wednesday to Thursday, when it was tried. My presence in Court was required by the attendance upon cases in which I had been duly and regularly employed as counsel for the other defendants; that is on Monday, Tuesday and Wednesday and Thursday of that week. I made a motion, as attorney for Lonnie Avery, to continue the case, the grounds for the motion are set out in it. That motion was submitted to the Court on the 24 of March, which was the date the case was called for trial. I introduced in evidence, at that time, in support of that motion, an affidavit, which is a part of the file in this cause. Mr. Foshee also submitted the motion; he was appointed, along with myself to defend Lonnie Avery. Copies of our motion are in the file in this cause, as well as copies of our affidavits. I was present at the arraignment of Lonnie Avery. I don't remember if the Judge of the Court making the appointment asked Lonnie Avery if he was able to employ counsel. I don't remember whether he asked him if he had friends or relatives who would be interested in assisting him in employing counsel to represent him. The defendant was a negro. I talked with the defendant, shortly after his arraignment, over in the county jail, after Court recessed that day. In my opinion he is very illiterate and ignorant. In my opinion, as a layman, I would say his mind is very weak. We went over and talked with him and he was unable to give us any information at that time, because he said he had been absent for about six years, and was unable to give us the names of any people who lived in that territory at the scene of the crime, and we were unable to get any information which might throw any light on the case at all. We were unable to get any information out of him that would aid us in his defense. As well as I remember, we got in touch with two of his brothers about thirty minutes before the trial, on Thursday; prior to that time we had made some effort to contact them. The first time we were [fol. 38] able to contact them was about thirty minutes before the trial. This defendant had been away from Ala-

bama for sometime, living in another State, according to my information. He had been back here a few weeks before his trial. I believe he was brought back the week before the criminal week; that is the best of my knowledge. I had not seen the defendant prior to his arraignment. I did not know anything about defending him until you were appointed to serve by the Court. I was unable to interview any witnesses that might have testified, other than those subpœnaed by the State. I was in Court up to the time of the trial and was unable to interview and discuss the case with witnesses who might have testified to the good character of the defendant; I was at no time, due to my position in Court, able to interview witnesses as to the bad character of the deceased, or as to the fighting, violent nature or character of the deceased; I was also unable to interview any witnesses as to the truth and veracity of the witnesses for the State. There were only three witnesses for the State and it is my information that two of them came from West Virginia. I had no opportunity to write to or investigate in any way the character for truth and veracity of the witnesses who lived in West Virginia. I was prevented by reason of my attendance upon this Court, from viewing the scene of the crime, which was located at a remote place in Bibb County, Alabama, and several miles from Centerville, where the trial was held. I was prevented, because of being employed in other cases, from interviewing the doctors here in Centerville as to this man's sanity. The physic-ans here in Centerville did not maintain their offices at night. I believe there were four practicing physic-ans in Centerville at that time.

At this point Mr. Moore, who is questioning the witnesses, asked the following question:

Q. Now are those physic-ans experts on mental diseases?

Whereupon the Court stated: "I'll sustain an objection to that."

I do not know whether the physicians here in Centerville are experts on mental diseases or not. I did not get any doctors to go and see the negro and examine him.

The Court thereupon asked the witnesses certain questions, to which he replied, in substance, as follows:

"I have been practicing law for three years; I live here in Centerville. I can't say how long Mr. Foshee has been

practicing law; he has been living here in Centerville for about three and a half years. To the best of my knowledge this defendant was arraigned directly after dinner on Monday. Mr. Foshee and I were appointed, I believe before the arraignment. We were appointed before the arraignment, because we interposed pleas for the defendant at the ar- [fol. 39] raignment. After Court was dismissed on Monday afternoon, we talked to the defendant; however, shortly before the arraignment, we talked to him, directly after being appointed. At the time we talked to the defendant he told us he had been away from here six years and did not remember who was living here then, at the time of the crime. We got no witnesses at the time of that first conference. To the best of my knowledge I had two cases on the docket for Monday, March 21. Neither one of these cases was tried on that day. I don't remember how many cases I had on the docket for Tuesday, besides the ones that were carried over. To the best of my knowledge the same two cases were carried over from Monday to Tuesday, and again to Wednesday and then Thursday and then settled on Thursday. I can't say where I went on Monday night after Court adjourned. I don't think I went to the picture show. I have an automobile. I sell automobiles at Blocton. I have a Plymouth automobile, which is in good running order and was at that time, on March 21, March 22, and March 23. Mr. Foshee has an automobile. I couldn't say whether it was in good running order on those dates. I don't remember that I consulted with any witnesses on Monday night in the cases in which I had been employed, as attorney. I don't remember doing that on either Tuesday or Wednesday night. As well as I remember, one or two of those nights Court was in session until nine or ten o'clock; I think it was during the trial of the case of the State against Jack Ware and it was tried until nine o'clock. My presence was not required in Court while that case was going on that night. This crime occurred about ten miles from Centerville, towards Selma, out in the Harrisburg community; you would go out highway number five to get there. That road is paved for about two miles out from Centerville; the rest of the highway is good gravel road towards Selma, but the scene of the crime is some distance off the highway. I couldn't say how far from the highway the crime occurred. I didn't go out to the scene of the crime on either Monday night, Tuesday night or Wednesday night; I can't say whether Mr. Foshee did or

not. I had never been to Harrisburg to investigate this crime up to the time of the trial. Dr. S. C. Meigs, Dr. T. E. Schoolar, Dr. Williams and Dr. Cooper Nicholson were the practicing physic-ans in Centerville; I know all these doctors personally; they are active physic-ans. I have never had to send for one of them. I would think, in a general way, they they would answer a call at night if I should call them. I was in Court all during their office hours and I never had a chance to go to their office during the day to see them and have a conference with them with respect to this man's sanity. The only time I have ever heard one of the local [fol. 40] physic-ans testify as to the mental condition of anybody was when one testified as to the mental condition of a negro up there in Court, and he had a letter from Dr. Partlow, that he read up there. I didn't have any one of those four physic-ans subpoenaed. I did not request any one of these four physic-ans to go to the jail and examine this defendant. I think all four of these physic-ans were here during that term of Court. Occasionally I buy Coca-colas at the Meigs Drug Store, and occasionally see Dr. Meigs there. I couldn't say that the same is true of Dr. Williams across the street; he does run a drug store across the street and I think he is there from day to day. The Meigs Drug Store is about a block and a half from the County jail. On the trial of this case there were no witnesses subpoenaed for the defendant. We hadn't had time to interview any witnesses, so neither Mr. Foshee nor I subpoenaed or requested the Clerk to subpoena any witnesses for the defendant on either the plea of not guilty or not guilty by reason of insanity. To the best of my knowledge Harrisburg is about ten miles from Centerville. I run a business at Blocton, which is an automobile sales agency fro Plymouth, cars, Dodge and Plymouth. I did not make any trips to Blocton on either Monday night, Tuesday night or Wednesday night for either pleasure or business. I don't remember leaving Centerville on any of those nights for a picture show in Marion, Calera or Selma. I can't say whether I was home on those nights. One one of those nights Mr. Foshee and I prepared some charges; I don't remember which night it was. There was a conference between Mr. Foshee and I with reference to witnesses, the law of the case and the strategy of the trial. We talked about the law in the case at the time we prepared the charges and we discussed the possibility of getting away from Court to

try to dig into the case and investigate it to see if we could not find out come witnesses as to the good character of the defendant, and as to the facts in the case. I did not request the Court for leave of absence in order to give me an opportunity of looking into the merits of the case.

Mr. L. S. Moore, a material witness in behalf of the defendant, testified as follows, after being first duly sworn:

"I want to say that after the defendant's conviction and sentence, I received a letter from his sister, who lives in West Virginia, and then, through correspondence with her I was employed in this case. I was not employed in the case prior to his conviction."

To which action, order and judgement of the court in overruling defendant's said motion to set aside the verdict and judgment against the defendant and to grant the defendant a new trial, the defendant did then and there duly except. [fol. 41] Whereupon the defendant, Lonnie Avery, does hereby tend and submit the above and foregoing and prays that same may be taken and considered as the defendant's legal Bill of Exceptions in said cause upon the same being considered and signed according to law by his Honor, John Miller, Judge of the 4th Judicial Circuit of Alabama, who presided as Judge of the Circuit Court of Bibb County, Alabama, upon the trial of said cause. This being within ninety days from the date when the Court overruled the defendant's said motion, for a new trial.

Presented to me on this Sept. 21, 1938.

Jno. Miller, Judge.

Order Settling Bill of Exceptions

The foregoing Bill of Exceptions was presented to me, John Miller, Judge of the 4th Judicial Circuit of Alabama, and the Judge of the Circuit Court of Bibb County, Alabama, who presided at said trial of The State of Alabama against Lonnie Avery in said cause, on this the 21 day of Sept. 1938, within ninety days from the date when the Court overruled the defendant's said motion for a new trial, and the above and foregoing is hereby proven and signed by me

and made the legal Bill of Exceptions in the above stated cause on this the 12th day of November, 1938, within the time allowed by law for signing same, as witness my hand.

Jno. Miller, Judge 4th Judicial Circuit of Alabama and presiding Judge upon the trial of said cause.

[File endorsement omitted.]

[fols. 42-47] Court's oral charge to jury omitted. Printed side page 21, ante.

[fol. 48] Upon the completion of the oral charge, the defendant's counsel objected to the Court furnishing forms for the verdict to the jury, without including among them, a form for convicted for manslaughter.

The Court, thereupon, granted the defendant an exception to this portion of the oral charge.

[fol. 49] The Court refused to give to the Jury the following written charges, requested by the defendant, to-wit:

Defendant's requested charge refused, omitted. Printed side page 29, ante.

[fol. 50] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 51] IN SUPREME COURT OF ALABAMA

Present: All the Justices.

2 Div. 144

LONNIE AVERY

vs.

THE STATE OF ALABAMA

Bibb Circuit Court

ORDER OF SUBMISSION—March 23, 1939

Come the parties by attorneys, and submit this cause on briefs for decision.

[fol. 52] IN SUPREME COURT OF ALABAMA

October Term, 1938-39

2 Div. 144

LONNIE AVERY

v.

STATE OF ALABAMA

Appeal from Bibb Circuit Court

OPINION

GARDINER, Justice.

The appeal is from a judgment of conviction of murder in the first degree, with infliction of the death penalty.

Before arraignment, defendant having no counsel, the trial court appointed two members of the local bar to defend him, and the record discloses these attorneys conscientiously exerted all reasonable efforts in his behalf. Their appointment was on Monday, March 21st, and the case was set for trial two days thereafter, but was not reached for trial until March 24th, at which time counsel made motion in writing for a continuance of the cause for lack of time for preparation.

Our examination of this record fails to disclose any order of the court on this motion. If a ruling was had thereon it does not here appear. The case proceeded to trial on the 24th, and a motion for a new trial, based upon the same grounds set forth in the motion for continuance, was denied. In view of the absence of any ruling on the motion for continuance, it may be seriously questioned that [fol. 53] this matter is properly here presented for review. But whether so or not, and conceding for the moment its proper presentation, no reversible error would be made to appear.

Here the appointment of counsel was no mere "empty formality," as insisted in brief, with citation of Powell v. State, 287 U. S. 45, 84 A. L. R. 527. This case presents no analogy to the Powell case, supra, nor to the other authorities called to our attention, viz.: Blackman v. State, 76 Ga. 288; State v. Collins, 104 La. 629, 81 Am. St. Rep. 150; North v. People, 139 Ill. 81, 28 N. E. 966; State v.

Simpson, 38 La. Ann. 23; Noel v. State, 17 Okla. Crim. Rep. 308, 188 Pac. 688; Jones v. State, 84 Tex. Crim. Rep. 4, 204 S. W. 437, as well as others cited in the note to Powell v. State, supra. The appointment here was far from a mere formality, and, indeed, this record shows that the two attorneys designated by the court to represent defendant, did their full duty intelligently and well.

The trial court's examination of counsel on the hearing of the motion for a new trial, demonstrates without further elaboration, there was presented no necessity for a continuance of the case, and we think the record discloses that the difficulty under which counsel labored related to the lack of material on which to base a defense, rather than any mere matter of time.

There were three eye-witnesses to the killing who testified for the State. Deceased was defendant's wife, though the couple had been living apart for two months, and unarmed was on her way from the house to get a wash-tub when the defendant shot her with a pistol as she ran. "When she broke to run, he fired at her twice. She turned round and made two or three steps toward him and fell on her face. He approached her then and stood above her and shot twice across her. She was still lying on her face. Then he walked back of her and fired a shot back here in the back of her head."

This was in February 1932. Defendant ran and was apprehended a short time before the trial (March 24, 1938) in Pennsylvania, denied that his name was Lonnie Avery, or that he came from Bibb County, or knew anyone there. Defendant did not deny the death of his wife from pistol shot wounds, but his defense was rested upon the theory [fol. 54] that deceased had the pistol which she drew from her sweater as they argued, and as she drew out the pistol, he attempted to take it from her and the pistol fired accidentally.

Counsel first interposed a plea of not guilty, and another of not guilty by reason of insanity. But upon the trial withdrew the latter plea. It is quite evident counsel became convinced this latter plea could not be sustained, and there is nothing in the record to indicate any improvement in this situation had the case been continued.

No witnesses for defendant were suggested, and we think it very clearly appears that those who testified were the only persons who were present.

The matter of continuance was in the sound discretion of the court, and it is clear enough no abuse of that discretion here appears—6 Ala. Digest (Key 586, et seq.); 16 Corpus Juris 482.

The trial court fully charged the jury both upon murder in the first and second degree, and furnished forms of verdict relating thereto, as well as a form for a verdict of not guilty. He likewise charged the jury as to an accident, and that if the killing was an accident the defendant might be acquitted. For the trial court's failure to furnish a form of verdict for manslaughter, defendant reserved an exception. But the mere failure of the court in that regard would not be here reviewable under McPherson v. State, 198 Ala. 6. See, also, Peterson v. State, 227 Ala. 361, 150 So. 156.

This aside, however, there was nothing in the record calling for a consideration of manslaughter in the first degree, to which exception related. Whitehead v. State, 206 Ala. 288.

We have treated the matter mentioned and discussed in brief. But mindful of our duty in cases of this character, we have examined the record for any reversible error that might appear, and upon due consideration, we find no error to reverse. Accordingly the judgment must stand affirmed.

Affirmed.

Anderson, C.J., Thomas, Bouldin, Brown, Foster, and Knight, JJ., concur.

[fol. 55] IN SUPREME COURT OF ALABAMA

Present: All the Justices.

2 Div. 144

LONNIE AVERY

vs.

THE STATE OF ALABAMA

Bibb Circuit Court

JUDGMENT—April 27, 1939

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs

and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error.

It is therefore considered that the judgment of the Circuit Court be in all things affirmed.

The time fixed by the judgment and sentence of the Circuit Court for the execution of the prisoner Lonnie Avery, having expired pending this appeal, it is now ordered that Friday, June 9th, 1939, be fixed as the date for the execution of the Defendant Lonnie Avery. It is therefore ordered that the Sheriff of Bibb County deliver the Defendant Lonnie Avery to the Warden of Kilby Prison at Montgomery, Alabama, and that the said Warden of Kilby Prison at Montgomery, Alabama, execute the judgment and sentence of the law on Friday, June 9th, 1939, before the hour of sunrise on said day in said prison, by causing a current of electricity of sufficient intensity to cause death to pass through the body of the said Lonnie Avery until he is dead, and in so doing he will follow the rules prescribed by the Statutes.

It is also considered that the appellant pay the costs of appeal of this Court and of the Circuit Court.

[fol. 56] IN SUPREME COURT OF ALABAMA

[Title omitted]

PETITION FOR STAY

To the Honorable John C. Anderson, Chief Justice of the Supreme Court of Alabama:

Your Petitioner, Lonnie Avery, by his attorneys John Foshee and L. S. Moore, respectfully exhibits this his petition and humbly complaining would show unto Your Honor facts as follows:

Your petitioner, Lonnie Avery, was convicted for the offense of murder in the first degree at the spring term of the Circuit Court of Bibb County, Alabama, 1938, and his punishment was set at death, and from that verdict and judgment the said Lonnie Avery instituted an appeal to the Supreme Court of Alabama. Said appeal was heard by the Supreme Court of Alabama and the judgment and convic-

tion in said cause was affirmed, and the said Lonnie Avery was ordered to be electrocuted on, to-wit: June 9th, 1939, as a punishment for said offense.

Your petitioner avers that in the trial of said cause in the Circuit Court of Bibb County, Alabama he was denied due process of law in contravention of the Constitution of the United States of America; that said question was presented by him in his said appeal to the Supreme Court of Alabama; that your petitioner has a legal right to present said cause to the Supreme Court of the United States of America by Writ of Certiorari; that your petitioner and his said attorneys have not to date had sufficient time in which to perfect the proceedings necessary to the commencement of his appeal to the said Supreme Court of the United States [fol. 57] of America or to cause said Writ of Certiorari to be issued; that your petitioner will petition the Supreme Court of the United States of America for a Writ of Certiorari directed to the Supreme Court of Alabama ordering a removal of said cause to the Supreme Court of the United States of America and for a consideration of said cause; that said proceedings will be ins-ituted within the time required by law.

Wherefore Your Petitioner prays that Your Honor will grant to him an order or decree staying or suspending said sentence, judgment, conviction and punishment pending the action of the Supreme Court of the United States of America in said cause.

John Foshee, Attorney for Petitioner. L. S. Moore, Attorney for Petitioner.

[fol. 58] IN SUPREME COURT OF ALABAMA

[Title omitted]

ORDER GRANTING STAY—May 24, 1939

Whereas, the Judgment of the Circuit Court of Bibb County, Alabama, in the case of Lonnie Avery vs. The State of Alabama was affirmed by this Court on April 27th, 1939, and the said Lonnie Avery was ordered to be electrocuted on Friday, June 9th, 1939; and,

Whereas, the said Lonnie Avery, through his Attorneys, has petitioned this Court for a suspension and stay of said

execution in order to give sufficient time to petition the Supreme Court of the United States for a Writ of Certiorari to be directed to this Court for a hearing of said cause in the Supreme Court of the United States;

Now, Then, It Is Ordered on petition of the Defendant, Lonnie Avery, that the date of the execution of the death sentence heretofore entered for June 9th, 1939, is hereby reset for Friday, June 30th, 1939, and this latter date is fixed for the date of the execution of the sentence of this Court.

[fol. 59] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 60-61] IN SUPREME COURT OF ALABAMA

[Title omitted]

PETITION FOR FURTHER STAY

To the Honorable Supreme Court of Alabama:

Your petitioner, Lonnie Avery, by his attorneys, L. S. Moore and John Foshee, respectfully exhibits this his petition and humbly complaining would show unto this Honorable Court facts as follows:

Your Petitioner was heretofore convicted for the offense of murder in the first degree in the Circuit Court of Bibb County, Alabama, and his punishment was set and fixed at death; that action of the circuit court of Bibb County, Alabama, was affirmed in all things, upon appeal, by this Honorable Court. The decision of this Court was rendered on the 27th day of April, 1939, and this Court re-set or fixed the 9th day of June, 1939, as the date for the execution of said sentence and punishment. This Court has heretofore granted an order or decree staying the sentence and execution of your petitioner and re-setting or fixing the 30 day of June, 1939, as the date for the execution of said sentence and your petitioner.

Your petitioner further avers that he has heretofore filed in the Supreme Court of the United States of America a petition for a writ of certiorari to be directed to this Court

in said cause; that said petition is now pending in said Court; that said Court is now in vacation and will not meet again before October 2, 1939; that said petition for a writ of certiorari cannot be heard or passed upon in said Court before the 2 day of October, 1939, which date is subsequent to the 30 day of June, 1939.

Therefore, your petitioner, humbly prays that this Honorable Court will render and order, decision, judgment or decree staying or suspending said sentence, judgment, conviction and punishment of your petitioner until the 13 day of October, 1939, or until the Supreme Court of the United States of America acts upon said petition for a writ of certiorari in said cause.

L. S. Moore, Attorney for Petitioner. John Foshee, Attorney for Petitioner.

[fol. 62] IN SUPREME COURT OF ALABAMA

[Title omitted]

ORDER GRANTING STAY—June 26, 1939

In this cause it is made to appear to the Court by petition that the Defendant [Appellant here], Lonnie Avery, has filed in the Supreme Court of the United States a petition for a Writ of Certiorari in this cause for a review of the decision and judgment of this Court, and that said petition is now pending in said Court and that said Court is now in vacation and will not meet again before October 2nd, 1939, and that said petition can not be heard or passed upon in said Court before the 2nd day of October 1939, which date is subsequent to the 30th day of June, 1939, the date heretofor set for the execution of the Defendant;

And petitioner now prays this Court that an order be entered passing the date of his sentence heretofore set to Friday, October 13th, 1939, so as to enable petitioner to present and have passed upon by the Supreme Court of the United States his petition for a Writ of Certiorari and a review of his cause by said United States Supreme Court. And this Court, acting upon said petition grants the same and at petitioner's request Friday, the 13th day of October, 1939, is the date set for the execution of the sentence of this

[fol. 63] Court, and until the final execution of the sentence of this Court jurisdiction is hereby retained over said cause.

The date of the execution of the sentence heretofore fixed by the Supreme Court on, to-wit: June 30th, 1939, being now reset by the Supreme Court of Alabama from June 30th, 1939, to October 13th, 1939, it is therefore ordered that the Sheriff of Bibb County, Alabama, deliver the defendant [appellant], Lonnie Avery to the Warden of Kilby Prison at Montgomery, Alabama, and that the said Warden of said Kilby Prison at Montgomery, Alabama, execute the judgment and sentence of the law on Friday, October 13th, 1939, before the hour of sunrise on said day in said prison by causing a current of electricity of sufficient intensity to cause death to pass through the body of the said Lonnie Avery until he is dead, and in so doing he will follow the rules prescribed by the Statutes.

[fol. 64] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 65] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 16, 1939

The petition herein for a writ of certiorari to the Supreme Court of the State of Alabama is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

Endorsed on cover: In forma pauperis. Enter Edward H. Saunders. File No. 43,531. Alabama Supreme Court, Term No. 124, Lonnie Avery, Petitioner, vs. The State of Alabama. Petition for a writ of certiorari and exhibit thereto. Filed June 20, 1939. Term No. 124, O. T. 1939.

FILE COPY

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FILED
JUN 20 1939
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 124

LONNIE AVERY,

Petitioner,

vs.

STATE OF ALABAMA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA AND BRIEF IN SUPPORT THEREOF.

EDWARD H. SAUNDERS,
Counsel for Petitioner.

JOHN FOSHEE,
LITA SPROGINS MOORE,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939

No. 124

LONNIE AVERY,

Petitioner,

vs.

STATE OF ALABAMA.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Lonnie Avery respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

Your petitioner was indicted for the offense of murder in the first degree by a grand jury of Bibb County, Alabama, at the second term of the Circuit Court of said County for the year 1934 (R. 1). Petitioner was arrested for the offense charged in the said indictment in Pittsburgh, Pennsylvania, and brought back to Bibb County, Alabama, about one week before his arraignment which occurred on March

21, 1938, soon after noon of that day (R. 16, 35, 1). Mr. Fred Wood and Mr. John Foshee were appointed by the trial court, Judge John Miller, to defend the petitioner at the time of his arraignment; and his trial was set at that time for Wednesday, March 23, 1938 (R. 1). At the time of petitioner's arraignment and the appointment of said attorneys to defend him the trial court did not ask the petitioner if he was able to employ counsel to represent him, or if he had friends or relatives who would be interested in assisting him to employ counsel to represent him (R. 33). The defendant, your petitioner, is a negro. He is ignorant and illiterate and probably insane. His mind appears to a layman as being feeble. He is unable to read or write (R. 31, 33). The attorneys appointed to defend him were unable to get any material information out of him. He could tell them little about the facts (R. 31). The scene of the alleged offense was several miles from the county seat and the courthouse (R. 31). His attorneys were unable to leave the court during the period of time from their appointment to the date of his trial due to the fact that it was the regular criminal court week and they were employed in other cases which were set for trial on Monday, Tuesday and Wednesday of that week which were subject to call at any time during those days (R. 5, 6, 32-33).

The petitioner's case was not tried on March 23, 1938, due to other cases that were in the process of trial. He was put to trial on Thursday, March 24, 1938 (R. 33). When his case was called for trial the attorneys appointed to defend him filed a written motion praying for a continuance of his case upon the grounds that they had not had a reasonable time to prepare the case for trial; that they had other cases in court which prevented them from leaving court to investigate the case; that to require the defendant to go to trial on that date would deny to the defendant the right to be represented by attorney, and other grounds

of the same nature (R. 4). This motion was supported by evidence in the form of affidavits executed by each of said attorneys (R. 5, 6), but it was denied and overruled by the trial court and petitioner was placed on trial on Thursday, March 24, 1938 (R. 7).

The petitioner was the sole witness called in his behalf during the trial of his case. The jury found the petitioner guilty of murder in the first degree and fixed his punishment at death. The judgment of the trial court followed the verdict of the jury, and sentenced petitioner to be put to death on Friday, May 13th, 1938, but the petitioner having taken an appeal to the Supreme Court of Alabama the trial court suspended the execution of his sentence to await the action of said Court on said appeal (R. 7, 8).

On March 24, 1938, attorney for petitioner filed in the Circuit Court of Bibb County, Alabama, a written motion for a new trial for petitioner, which motion was subsequently amended, and which motion as amended was based upon the grounds that the court erred in refusing to grant the motion of the defendant for a continuance; that the court abused its discretion in refusing to grant the motion of the defendant for a continuance of said cause; that defendant was denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America, specifically as follows: the defendant was not given a fair, impartial and deliberate trial; that the defendant was denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America, specifically as follows: the defendant was denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial (R. 9, 10). The grounds for said motion for a new trial were

established by unimpeached evidence submitted in support thereof (R. 31-37). The said motion for a new trial as amended was denied by the trial court and the defendant duly and legally excepted to the ruling of the court on June 30, 1938 (R. 10).

The cause then proceeded by appeal to the Supreme Court of Alabama and the bill of exceptions of the defendant, your petitioner, in said appeal specifically set out the above mentioned motion for a continuance and the motion of the defendant for a new trial in said cause based upon the grounds above set out and the evidence in support thereof (R. 11-37). The Supreme Court of Alabama by a decision rendered on the 27th day of April, 1939, affirmed the action of the trial court in all things and denied that your petitioner had been denied due process of law and equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America in any substantial manner (*Avery* v. *State*, 188 So. 391; R. 39-42). Thereupon the Supreme Court of Alabama rendered a judgment and sentence in said cause in and by which June 9, 1939 was fixed as the date for the execution of your petitioner, which was stayed subsequently until June 30th, 1939 (R. 43). That decision, judgment and sentence of the Supreme Court of Alabama, upon said appeal by your petitioner, was a final judgment or decree by the highest court of the State of Alabama in which a decision could be had in said cause. Hence, this petition for a writ of certiorari to be issued out of this Honorable Court direct to the Supreme Court of Alabama requiring that court to certify and send to this Court for its review and determination a full and complete transcript of the record of all proceedings in said cause.

B.

A Statement of the Basis of the Jurisdiction of This Court to Review the Judgment or Decree in Question.

The statutory provision under which such jurisdiction is invoked is Section 344 of Title 28, U. S. C. A. (Judicial Code, Section 237, as amended). Your petitioner specially set up or claimed a right, privilege, or immunity guaranteed to him under, in and by the Fourteenth Amendment to the Constitution of the United States of America in his written motion for a continuance of the cause addressed to the trial court (R. 4-5), in his written motion for a new trial, as amended, addressed to the trial court (R. 9, 10), and in and by his appeal to the Supreme Court of Alabama and his bill of exceptions in connection therewith (R. 11-37); and in each instance the same was denied to him. (See R. 7, 10, 39-42). The Federal questions of substance set up and claimed in each instance are specifically set out below. This petition has been duly made and filed in this Honorable Court within three months after the entry of final judgment or decree of the Supreme Court of Alabama, the highest court of the State of Alabama in which a decision could be had in said cause, as provided by Section 350 of Title 28, U. S. C. A.

C.

The Question Presented.

1.

Was the petitioner denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America, specifically as follows: the petitioner was not given a fair, impartial and deliberate trial.

2.

Was the petitioner denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America, specifically as follows: the petitioner was denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial.

D.

Reason Relied Upon for the Allowance of the Writ.

The Supreme Court of Alabama, the State's highest Court below, has decided a Federal question of substance in a way, probably not in accord with the applicable decisions of this Court (see *Powell* v. *State of Alabama*, 287 U. S. 45), in that its decisions in this cause in substance a denial to your petitioner of a fair, impartial and deliberate trial, and a denial to your petitioner of the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial. Only two days and one half of a day elapsed from the appointment of attorneys for your petitioner until he was put to trial. His attorneys had no opportunity to consult with probable witnesses, view the scene of the crime, secure mental specialist to examine him, secure character witnesses or any other witnesses or any other evidence that may have been available due to the fact that they were continuously detained in court because of other cases in which they were employed and set for trial on all of those days, which were subject to call at any time on each of those days. Their appointment and service was a mere empty formality. Your petitioner was denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America as pointed out.

E.

Prayer.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Alabama, requiring that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 144, Second Division, October Term, 1938-39, Lonnie Avery, Appellant, *v.* State of Alabama, and that the said judgment of the Supreme Court of Alabama be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

EDWARD H. SAUNDERS,
Counsel for Petitioner.

JOHN FOSHEE,
LITA SPROGINS MOORE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 124

LONNIE AVERY,

Petitioner,

vs.

STATE OF ALABAMA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion in the court below, written by Justice Gardner, in this cause, has not as yet been officially reported in the Alabama Reports. It may be found in the official transcript of the record on pages 39 to 41, inclusive. It was rendered on April 27, 1939, and may be found when officially reported in 188 So. 391.

The Circuit Court of Bibb County, Alabama, the trial court of this cause, rendered no opinion in connection with its decision (R. 7, 10).

II.

Jurisdiction

The statutory provision under which such jurisdiction is invoked is Section 344 of Title 28, U. S. C. A. (Judicial Code, Section 237, as amended). Your petitioner specially set up or claimed a right, privilege, or immunity guaranteed to him under, in and by the Fourteenth Amendment to the Constitution of the United States of America in his written motion for a continuance of the cause addressed to the trial court (R. 4-5), in his written motion, as amended, for a new trial addressed to the trial court (R. 9, 10), and in and by his appeal to the Supreme Court of Alabama and his bill of exceptions in connection therewith (R. 11-37); and in each instance the same was denied to him. (See R. 7 and 8 showing defendant was put to trial, R. 10, and R. 39 to 42, inclusive.) The Federal questions of substance set up and claimed in each instance are specifically set out below in our Specification of Error.

This petition has been duly made and filed in this Honorable Court within three months after the entry of final judgment or decree of the Supreme Court of Alabama in this cause, the highest court of the State of Alabama in which a decision could be had in said cause, as provided by Section 350 of Title 28, U. S. C. A. The cases believed to sustain the jurisdiction are: *Powell* v. *State of Alabama*, 287 U. S. 45; *Ed Brown, et al.* v. *State of Mississippi*, 80 L. Ed. 682; and *Johnson* v. *Zerbst*, 304 U. S. 458, 82 L. Ed. 1461.

III.

Statement of the Case.

Your petitioner was indicted for the offense of murder in the first degree by a grand jury of Bibb County, Alabama, at the second term of the Circuit Court of said County for

the year 1934 (R. 1). Petitioner was arrested for the offense charged in the said indictment in Pittsburgh, Pennsylvania, and brought back to Bibb County, Alabama, about one week before his arraignment which occurred on March 21, 1938, soon after noon of that day (R. 16, 35, 1). Mr. Fred Wood and Mr. John Foshee were appointed by the trial court, Judge John Miller, to defend the petitioner at the time of his arraignment; and his trial was set at that time for Wednesday, March 23, 1938 (R. 1). At the time of petitioner's arraignment and the appointment of said attorneys to defend him the trial court did not ask the petitioner if he was able to employ counsel to represent him, or if he had friends or relatives who would be interested in assisting him to employ counsel to represent him (R. 33). The defendant, your petitioner, is a negro. He is ignorant and illiterate and probably insane. His mind appears to a layman as being feeble. He is unable to read or write (R. 31, 32). The attorneys appointed to defend him were unable to get any material information out of him. He could tell them little about the facts (R. 31). The scene of the alleged offense was several miles from the county seat and the courthouse (R. 31). His attorneys were unable to leave the Court during the period of time from their appointment to the date of his trial due to the fact that it was the regular criminal court week and they were employed in other cases which were set for trial on Monday, Tuesday and Wednesday of that week which were subject to call at any time during those days (R. 5, 6, 32-33).

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which prevented them from leaving court to investigate the case; that to require the defendant to go to trial on that date would deny to the defendant the right to be represented by attorney, and other grounds of the same nature (R. 4). This motion was supported by evidence in the form of affidavits executed by each of said attorneys (R. 5, 6), but it was denied and overruled by the trial court and petitioner was placed on trial on Thursday, March 24, 1938 (R. 7).

The petitioner was the sole witness called in his behalf during the trial of his case. The jury found the petitioner guilty of murder in the first degree and fixed his punishment at death. The judgment of the trial court followed the verdict of the jury, and sentenced petitioner to be put to death on Friday, May 13th, 1938, but the petitioner having taken an appeal to the Supreme Court of Alabama the trial court suspended the execution of his sentence to await the action of said Court on said appeal (R. 7, 8).

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the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial (R. 9, 10). The grounds for said motion for a new trial was established by unimpeached evidence submitted in support thereof (R. 31-37). The said motion for a new trial as amended was denied by the trial court and the defendant duly and legally excepted to the ruling of the court on June 30, 1938 (R. 10).

The cause then proceeded by appeal to the Supreme Court of Alabama and the bill of exceptions of the defendant, your petitioner, in said appeal specifically set out the above mentioned motion for a continuance and the motion of the defendant for a new trial in said cause based upon the grounds above set out and the evidence in support thereof (R. 31-37). The Supreme Court of Alabama by a decision rendered on the 27th day of April, 1939, affirmed the action of the trial court in all things and denied that your petitioner had been denied due process of law and equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America in any substantial manner (*Avery* v. *State*, 188 So. 391; R. 39-42). Thereupon the Supreme Court of Alabama rendered a judgment and sentence in said cause in and by which June 9, 1939 was fixed as the date for the execution of your petitioner, which was stayed subsequently until June 30th, 1939 (R. 43). That decision, judgment and sentence of the Supreme Court of Alabama, upon said appeal by your petitioner, was a final judgment or decree by the highest court of the State of Alabama in which a decision could be had in said cause. Hence, this petition for a writ of certiorari to be issued out of this Honorable Court direct to the Supreme Court of Alabama requiring that court to certify and send to this Court for its review and determination a full and complete transcript of the record of all proceedings in said cause.

IV.

The Specification of Errors.

1. The trial court erred in overruling the petitioner's motion for a continuance of the cause (R. 4 and see also date of judgment, R. 7), as did the court below in its approval thereof.

2. The trial court erred in overruling the motion of petitioner for a new trial (R. 10), as did the court below in its approval thereof.

3. The Supreme Court of Alabama erred in affirming the action of the trial court in all things (R. 39-42, inclusive).

4. The trial court and the Supreme Court of Alabama erred in this: Your petitioner was denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America, specifically as follows: the petitioner was not given a fair, impartial and deliberate trial.

5. The trial court and the Supreme Court of Alabama erred in this: Your petitioner was denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America, specifically as follows: the petitioner was denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial.

V.

Argument.

The facts disclose that the attorneys appointed by the Court to defend your petitioner did not have sufficient time in which to properly and reasonably prepare the case for trial; that said attorneys made no investigation; that no witnesses were summoned for the petitioner; that petitioner

was ignorant and possibly feebleminded and unable to represent himself; that your petitioner was poor and was not asked if he could employ counsel or had friends or relatives who, if communicated with, might assist him in employing counsel to represent him; that counsel appointed were not of petitioner's own selection and that the entire trial was a mere formality. Certainly the facts disclose that the petitioner was denied due process of law and the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States of America as pointed out. (*Ozie Powell et al.* v. *State of Alabama*, 287 U. S. 45, 84 A. L. R. 527.)

The right to counsel in this case must be conceded by the State of Alabama. (Code of Alabama 1923, Section 5567; Constitution of Alabama 1901, Section 6.) The right to counsel implies that accused shall have opportunity to select such counsel. (*Powell* v. *State of Alabama*, *supra*; *Smith* v. *United States*, Court of Appeal of District of Columbia, 288 F. 259; *Louie Yung* v. *Coleman*, Sheriff, United States District Court, 5 F. Supp. 702; *Dillingham* v. *United States*, Circuit Court of Appeals, 76 F. (2d) 36.)

In discussing the question of the right of accused to counsel in the case of *Ed Brown, Henry Shields, and Yank Ellington* v. *State of Mississippi*, 80 L. Ed. 682, this Court said:

> "The State is free to regulate the procedure of its courts in accordance with its own conception of policy, unless in so doing it, 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' Rogers *v.* Peck, 199 U. S. 425. The State may abolish trial by jury. It may dispense with indictment by a grand jury and substitute complaint or information. Walker *v.* Sanvinet, 92 U. S. 90; Hurtado *v.* California, 110 U. S. 516; Snyder *v.* Massachusetts, 291 U. S. 97. But the freedom of the state in establishing its policy is the free-

dom of Constitutional Government and is limited by the requirement of due process of law. Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and the torture chamber may not be substituted for the witness stand. The State may not deny the accused the aid of counsel. Powell *v.* Alabama, 287 U. S. 45."

Thus the aid of counsel is ranked with rights so fundamental as freedom from the rack and torture chamber and freedom from trial by ordeal.

The right to counsel would be of little worth if it did not include the right to counsel who had been given a reasonable opportunity to investigate the case and prepare for trial. It is a difficult task to defend a negro, accused of a capital offense, in Alabama. Every opportunity should be granted counsel, appointed, to defend such a case, to investigate the case, interview witnesses, view the scene of the offense, and prepare for trial. (See Annotation to *Powell* v. *State of Alabama* in 84 A. L. R. 544, showing rule that a reasonable time for the preparation of defendants case must be allowed between the time of assignment of counsel by the court and date of trial.)

In the case of *Powell* v. *State of Alabama,* above cited, this Court said, "During perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough going investigation and preparation were vitally important, the defendant did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself. *People ex rel. Burgess* v. *Risley,* 66 How. Pr. 67; *Batchelor* v. *State,* 189 Ind. 69, 76, 125 N. E. 773."

The Supreme Court of Alabama in this case said, "The difficulty under which counsel labored related to the lack

of material on which to base a defense, rather than any mere matter of time" (R. 40). The language of the case of *Powell* v. *State of Alabama, supra,* carries a different meaning in saying, "Neither they (counsel) nor the court could say what a prompt and thorough going investigation might disclose as to the facts".

The court below in its opinion in this case (R. 40) relies on the cross-examination of counsel by the trial court. In that examination the trial court resorts to the method of attempting to establish a fact by inference or insinuation in the subject matter or form of question which is dissipated by the answer to the question.

The court below questions whether the matter is properly presented for review since the record does not show a ruling by the trial court on the motion to continue the cause. The motion was presented in open court and that fact is proven by the testimony of the appointed attorneys and the defendant was put to trial. That should prove the trial court overruled the motion. But the court below has a misconception of the nature of petitioner's complaint. That complaint is not, solely, of the commission of mere error, but of a wrong so fundamental that it made the whole proceedings a mere pretense of a trial and rendered the conviction and sentence wholly void. We are not concerned with a mere question of state practice. The duty of maintaining constitutional rights of a person on trial for his life rise above mere rules of procedure. The conviction was void for want of due process, and the proceedings thus vitiated could be challenged in any appropriate manner. It was challenged in Supreme Court of Alabama by invocation of Fourteenth Amendment and also in the trial court by the motion for a new trial in the same manner. (*Ed Brown, et al.* v. *State of Mississippi,* 80 L. Ed. 682, *supra; Johnson* V. *Zerbst,* 304 U. S. 458, 82 L. Ed. 1461.)

Conclusion.

It is, therefore, respectfully submitted that this cause is one calling for the exercise by this Court of its supervisory powers, and that to such an end a writ of certiorari should be granted, and this Court should review the decision of the Supreme Court of Alabama in this cause and finally reverse it.

EDWARD H. SAUNDERS,
Counsel for Petitioner.

JOHN FOSHEE,
LITA SPROGINS MOORE,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 124

LONNIE AVERY,

Petitioner,

vs.

STATE OF ALABAMA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

REPLY BRIEF OF PETITIONER

L. S. MOORE,
JOHN A. FOSHEE,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 124

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STATE OF ALABAMA

REPLY BRIEF OF PETITIONER

The Attorney General of Alabama in his brief, filed in this cause in behalf of the State of Alabama, has cited and made reference to numerous decisions of the Supreme Court of the various States discussing the question raised by the denial of a motion for a continuance of a criminal case under the constitution and laws of that State.

The reference that we have made to the decisions of State courts in our original brief, heretofore filed in this cause, makes it clear that the State courts are not altogether in accord upon the subject, even under their laws.

It is our idea that decision of State courts construing State law and State constitutional law are not controlling upon this Honorable Court in its application of the facts in this case to the due process of law clause of the 14th

Amendment to the Constitution of the United States of America. In the case of *Powell* v. *State of Alabama*, 84 A. L. R. 527, 287 U. S. 45, this Court reversed the case although the Supreme Court of Alabama had held that its Constitution and laws had not been contravened.

In the case of *Herbert* v. *Louisiana*, 71 L. Ed. 270, decided in 1926, this Court said:

> "Whether a State Statute shall be construed one way or another is a State question, the final decision of which rest with the courts of the State. The due process of law clause of the 14th Amendment does not take up the statutes of the several States and make them the tests of what it requires; nor does it enable this Court to revise the decisions of State courts on questions of State law.
>
> What it does require is that the State action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."

After making certain other assertions the court continued:

> "Those principles are applicable alike to all the States and do not depend upon or vary with local legislation."

State decision, however, applying the laws of that State, may throw some light upon the rule that a reasonable time must be allowed counsel appointed to defend a case of this nature in which to prepare for trial. That rule is gathered from the expressions of the *Powell* case, *supra*, when it said:

> "That duty is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."

The Federal courts have applied the above rule in decisions rendered since the *Powell* case, *supra*, in the case of

Jones v. *Commonwealth of Kentucky*, Circuit Court of Appeals, Sixth Circuit, decided June 8, 1938, 97 F. (2d) 335. In that case Jones was convicted of murder in the Kentucky courts and sentenced to death. He exhausted all right of appeal in the State courts and then challenged by petition for writ of habeas corpus, filed in United States District Court, the manner of his conviction as an impairment of the due process clause of the 14th Amendment in that he was denied the right of counsel with the accustomed incidents of consultation and time to prepare for trial. He was indicted on Nov. 4, for killing his wife; arraigned Nov. 8 and counsel appointed to defend him and trial set for Tuesday, Nov. 12; but was not reached until Thursday, Nov. 14. Motion for a continuance was denied by the State court. His trial began 10 days from the indictment and 6 days from the appointment of attorneys. There was an appeal from the Federal District Court. The Circuit Court of Appeals held:

> "It is true the trial court recognized its duty to assign counsel as a necessary requisite of due process of law, but, 'that duty is not discharged by an assignment at such time and under such circimstances as to preclude the giving of effective aid in the preparation and trial of the case.' Powell *v.* Alabama, 287 U. S. 45. It is likewise true that three days were available to counsel within which to make an investigation and prepare for trial. But when we take into consideration that this was a capital case, that the defendant was in jail and unable himself to give assistance, that the trial was to be held at a distance from the place where the crime was committed, and that counsel brought to the attention of the court by motion and supporting affidavit his inability to properly prepare for trial within the time, we think it must be concluded that the Constitutional right of the defendant to be heard by counsel as a necessary requisite of due process of law has not been preserved to him."

That case as to the facts is in all respects a parallel to the case at bar, except that in that case counsel did have three days that he was not engaged in court in which to prepare for trial.

There has been no contention made by the petitioner in this cause that he is entitled to an exact amount of time; that is to say one hour, one day, one week, or one month. The contention is, however, that attorneys appointed to defend such a case should be given a reasonable time in which to investigate and prepare for trial. And making up our mind as to that we should not become speculative and say as the Supreme Court of Alabama did in this case, the trouble is with a lack of material on which to base a defense rather then a mere matter of time. Compare the language of the *Powell* case, *supra*, with that.

We respectfully submit that this petitioner was denied, by the courts of Alabama, his constitutional right to be heard by counsel as a necessary requisite of due process of law.

Respectfully submitted,

L. S. Moore,
John A. Fosher,
Counsel for Petitioner.

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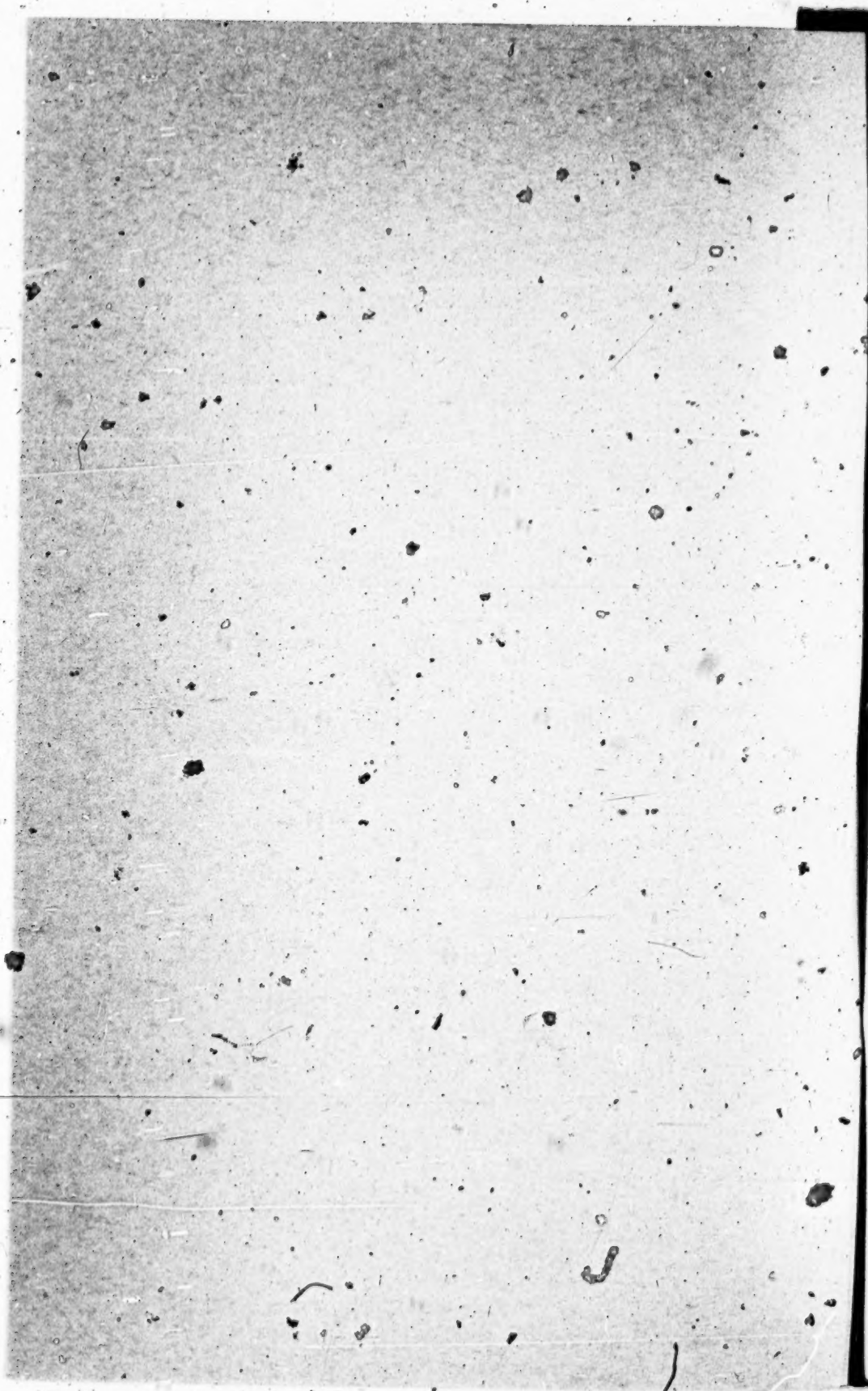
BRIEF FOR RESPONDENT

THOMAS S. LAWSON,

Attorney General of Alabama.

WILLIAM H. LOEB
Assistant Attorney General,
On The Brief.



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Supreme Court of the United States

OCTOBER TERM, 1939

NO. 124

LONNIE AVERY,

Petitioner

v.

STATE OF ALABAMA,

Respondent

BRIEF FOR RESPONDENT

OPINION OF THE COURT BELOW

I.

This case is before this Court pursuant to certiorari granted October 16, 1939. The opinion of the Supreme Court of Alabama is reported as follows; *Avery v. State of Alabama*, 188 So. 391.

The opinion of the court below appears in the record in this case on page 39. All of the Justices concurred in the opinion rendered in the court below.

II.

JURISDICTION

1. The statutory provision by which jurisdiction of this proceeding is authorized is Section 344 of Title 28, U. S. C. A. (Judicial Code, Section 237, as amended).

2. The opinion of the court below was rendered on April 27, 1939, and the fifteen days allowed for making application for rehearing in the Supreme Court of Alabama expired without such application for rehearing having been made.

3. Petitioner in his motion for continuance and in his motion for new trial as finally presented to the Trial Court claimed that he was deprived of his constitutional rights in that, (a) he was convicted without due process of law and (b) he was denied equal protection of law.

III.

STATEMENT OF THE CASE

The petitioner was indicted by a Grand Jury of Bibb County, Alabama, of the crime of murder in the first degree. The indictment was filed on October 4, 1934 (R. 1).

The petitioner was arrested in Pittsburgh, Pennsylvania, and was returned to Bibb County, Alabama, during the middle of March, 1938, a short

time before the trial of this case (R. 16). On March 21, 1938, petitioner was arraigned and, having no counsel, the Court in accordance with the provisions of Section 5567 of the Code of Ala. 1923, appointed two members of the Bar of Bibb County, Alabama to represent the defendant. The attorneys so appointed in open Court and in the presence of the defendant interposed pleas of "not guilty" and "not guilty by reason of insanity." The Court thereupon ordered that the case be tried on Wednesday, March 23, 1938, (R. 1).

The case was not reached, however, until Thursday, March 24, 1938. Prior to entering upon the trial of the case the attorneys, theretofore appointed by the Court to represent the petitioner, filed on Thursday, March 24, 1938, a motion for a continuance (R. 4). The several grounds assigned in the motion for continuance all assert that because of the alleged proximity of the date on which the Court ordered the case to be tried to the date on which counsel had been appointed, the appointed attorneys had not had a reasonable time in which to prepare the case for trial nor to investigate the facts of the case. It was further alleged in said motion that said attorneys had not had sufficient time to prepare the law of the case. The motion contained allegations that the counsel appointed to represent the petitioner were busily occupied with other cases in Court during the interim between the time of appointment and the date set for the trial. It was further alleged therein that the defendant was unable to employ counsel and that to force him to trial on March 24, 1938, under

such circumstances, denied to the defendant the right to be represented by counsel (R. 4).

Affidavits in support of the motion for continuance were filed by the appointed counsel (R. 5, 6, 7).

The record does not expressly show a ruling on the motion for continuance but it is obvious that it was not allowed as the case was tried on the same date upon which said motion was filed (R. 5, 11).

Briefly stated the evidence shows the killing of a negro woman by her husband, a negro man, more than four years before the trial.

The evidence introduced on behalf of the State consisted, in part, of three eye witnesses who testified that the deceased, defendant's estranged wife, was, on February 13, 1932, on her way, unarmed, from the home of her foster father with whom she was living at that time to the home of one Louis Snead to get a wash tub, when the defendant accosted her and shot her with a pistol as she ran. It further appears from the testimony that after he had shot her, she turned around, took two or three steps toward him and fell on her face, and while she was still lying on the ground he approached her and standing over her shot twice, hitting her in the back of the head (R. 12, 13, 14, 15). The testimony further reveals that immediately after the shooting fracas, defendant fled the scene of the crime and remained at large for more than four years, being apprehended a short time before the trial (March

24, 1938) in Pennsylvania (R. 16). At the time he was apprehended, the defendant denied that his name was Lonnie Avery or that he came from, or knew anyone in Bibb County, Alabama (R. 16).

The defendant at his trial testified for himself and did not deny the death of his wife from pistol shot wounds but rested his defense upon the theory that the killing was accidental in that deceased had a pistol which she drew from her sweater as they argued and, in his attempt to take it from her, the pistol was fired accidentally, and that when he realized she was shot he ran from the scene of the shooting. On cross-examination of the petitioner it was established that he was an ex-convict (R. 17, 18, 19).

The petitioner was found guilty of murder in the first degree by a jury of Bibb County, Alabama, on March 24, 1938 (R. 7, 30). The jury fixed his punishment at death (R. 30). Petitioner was thereupon adjudged guilty by the Court and sentenced to be electrocuted (R. 7, 8). Counsel for petitioner forthwith filed a motion to arrest and set aside the verdict and to grant the defendant a new trial, assigning several grounds in support of the motion to the effect that the verdict was contrary to the law and the evidence in the case and that the Court erred in refusing to grant the defendant a continuance (R. 9, 10). The motion for new trial was first set down for hearing on April 16, 1938, and was continued several times, finally being heard on June 30, 1938, which date was more than three

months after the petitioner was tried (R. 10). On June 30, 1938, counsel for petitioner, with leave of the Trial Court, amended their motion for a new trial by adding the following additional grounds:

"9. The defendant was denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to The Constitution of the United States of America, specifically as follows: the defendant was not given a fair, impartial and deliberate trial.

"10. The defendant was denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America, specifically as follows: The defendant was denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial.

"11. The defendant was denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America specifically as follows: (1) The defendant was not given a fair, impartial and deliberate trial; and (2) the defendant was denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation of trial.

"12. The defendant was denied due process of law in contravention of The Fourteenth Amendment to the Constitution of the United States of America.

"13. The defendant was denied due protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States of America."

On the hearing of the motion for new trial the attorneys who had been appointed by the Court to represent the petitioner were examined by the Court and by an attorney subsequently employed by the petitioner (R. 31, 32, 33, 34, 35, 36, 37).

The Court after hearing the motion for new trial, as amended, overruled said motion to which action the counsel for petitioner excepted (R. 10). The case was then appealed to the Supreme Court of Alabama, which is the court of last resort of the State. In an opinion written by Mr. Justice Gardner and concurred in by the other Justices, the judgment of the Trial Court was affirmed. In the opinion of the Supreme Court of Alabama it was held that the petitioner had not been denied due process of law or equal protection of the law (R. 39, 40, 41). The Supreme Court of Alabama fixed June 9, 1939, as the date on which the sentence of the Trial Court should be carried out. The date for the carrying out of the sentence of the Trial Court has been changed from time to time because of the proceedings in this Court (R. 43, 44, 45, 46).

IV.

ARGUMENT.

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW.

A

PETITIONER WAS GIVEN A FAIR, IMPARTIAL AND DELIBERATE TRIAL.

Peitioner's trial was in all respects held in accordance with the Constitution and statutes of the State of Alabama, which provisions are in no manner attacked as being unconstitutional. The court of last resort decided his case in compliance with those rules of appeal and error which they apply in all cases. The following procedure was followed in compliance with the requirements of the statutes of Alabama.

(a) An indictment was returned by a grand jury.—Sections 4524, 4526, 4529, 4556(76), 5202, 8616, 8617, 8630, 8632, and 8665 of the Code of Alabama, 1923.

(b) Petitioner was notified of the offense with which he was charged.—Sections 5568 and 8644 of the Code of Alabama, 1923.

(c) The date of trial was set by the trial judge. —Sections 5565, 8649 and 8650, Code of Alabama, 1923.

(d) Counsel were appointed to represent the petitioner.—Section 5567, Code of Alabama, 1923.

(e) Qualifications of jurors.—Section 14 of an Act approved February 18, 1931, Acts, 1931, p. 56; Section 8603, Code of Alabama, 1923.

B

PETITIONER WAS NOT DENIED THE RIGHT OF COUNSEL WITH THE ACCUSTOMED INCIDENTS OF CONSULTATION AND OPPORTUNITY OF PREPARATION FOR TRIAL.

(1)

Powell Case Distinguished

Counsel for petitioner in brief filed in support of petition for writ of certiorari argue only the proposition that the defendant was denied due process of law in that he was denied the right of counsel with the accustomed incidents of consultation and opportunity of preparation for trial.

This Court in the case of *Ozie Powell et al. v. State of Alabama*, 287 U. S. 45, has definitely determined that the right to counsel in a criminal case is one of the fundamental principles of liberty and justice which lie at the base of our civil and

political institutions and that the denial to a defendant in a criminal case of the right to be represented by counsel amounts to a denial of due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

We think it important, however, to emphasize at this time the facts which were before this Court in the Powell case, supra. Powell, together with eight other negro boys, was arrested in Jackson County, Alabama, charged with the rape of two white girls while traveling on a freight train between Chattanooga, Tennessee, and Huntsville, Alabama. Powell and his co-defendants were taken off of a train by a sheriff's posse and transferred to the jail at Scottsboro, the county seat of Jackson County. The militia was called out to assist in safeguarding the prisoners and continued to guard them until after the trials had been completed. The proceedings from beginning to end took place in an atmosphere of tense, hostile and excited public sentiment. All of the defendants were youthful, ignorant and illiterate. All of them were residents of other states where their families and friends resided. When Powell and his co-defendants were arraigned, the entire Bar of Jackson County was appointed to defend the several defendants. On the day on which the trials were to begin, when the court inquired whether the parties were ready for trial no counsel answered for the defendants or appeared to represent or defend them. The decision of this Court contains a long colloquy between a lawyer of Chattanooga, Tennessee, the Court and some members of

the Bar of Scottsboro, Alabama, who had been appointed to represent the defendants. This colloquy tends to indicate that it had not been determined definitely as to who was to represent the defendants. Mr. Justice Sutherland, in the Powell opinion, after quoting the colloquy above referred to, said:

> "And, in this casual fashion, the matter of counsel in a capital case was disposed of.
>
> "*It thus will be seen that until the very morning of the trial, no lawyer had been named or definitely designated to represent the defendants.* Prior to that time, the trial judge had 'appointed all the members of the Bar' for the limited 'purpose of arraigning the defendants'. Whether they would represent the defendants thereafter if no counsel appeared in their behalf was a matter of speculation only, or as the judge indicated, a mere anticipation on the part of the court. Such a designation, even if made for all purposes, would, in our opinion, have fallen far short of meeting, in any proper sense, a requirement for the appointment of counsel. How many lawyers were members of the Bar does not appear; but in the very nature of things, whether many or few, they would not, thus collectively named, have been given their clear appreciation of responsibility or impressed with that individual sense of duty which should, and naturally would, accompany the appointment of a selected member of a Bar specifically named and assigned.

"That this action of the trial judge in respect of appointment of counsel was little more than an expansive gesture, imposes no substantial or definite obligation upon anyone, is borne out by the fact that prior to the calling of the case for trial on April 6, a leading member of the local bar accepted employment on the side of the prosecution and actively participated in the trial."

"Nor do we think the situation was helped by what occurred on the morning of the trial. At that time, as appears from the colloquy printed above, Mr. Roddy stated to the court that he did not appear as counsel but that he would like to appear along with counsel that the court might appoint; that he had not been given an opportunity to prepare the case; that he was not familiar with the procedure in Alabama, but merely came down as a friend of the people who were interested; that he thought the boys would be better off if he should step entirely out of the case. Mr. Moody, a member of the local bar, expressed a willingness to help Mr. Roddy in anything he could do under the circumstances. To this the court responded, 'all right, all the lawyers that will; of course, I would not require a lawyer to appear if—.' Mr. Moody continued, 'I am willing to do that for him as a member of the bar; I will go ahead and help do anything I can do.' *With this dubious understanding the trials immediately proceeded, the defendants, young, ignorant, il-*

literate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime, regarded with especial horror in the community where they were tried, were thus put in peril of their lives within a few minutes after counsel for the first time charged with any degree of responsibility, began to represent them." (Emphasis supplied)

Basing his conclusions entirely on the facts presented, Mr. Justice Sutherland proceeds to announce, for the first time, the rule that the Fourteenth Amendment to the Constitution of the United States guarantees to a defendant charged with a capital offense in a state court the right to counsel. The following quoted part of the opinion of the Powell case contains the real holding therein, and clearly demonstrates how very carefully Mr. Justice Sutherland predicated his conclusion on the facts presented in the particular case at bar (287 U. S. 71, 72):

"*In the light of the facts outlined in the forepart of this opinion* — the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and oppor-

tunity to secure counsel was a clear denial of due process.

"But passing that, and assuming their inability even if opportunity had been given, to employ counsel as the trial court evidently did assume, we are of opinion that, *under the circumstances just stated*, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. *Whether this would be so in other criminal prosecutions or under other circumstances we need not determine.* All that is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate, already adverted to 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' *In a case such as this, whatever may be the rule*

in other cases, the right to have counsel appointed is a logical corollary from the constitutional right to be heard by counsel." (Emphasis supplied)

This Court has itself officially recognized Justice Sutherland's expressed intent to limit the scope of his opinion to the facts therein presented. In *Palko v. Connecticut*, 302 U. S. 319, 327, Mr. Justice Cardozo speaks for the Court regarding the Powell decision:

> "The decision did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a Federal court. *The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing.*" (Emphasis supplied)

The Court's attention is also respectfully called to the following cases in which the several courts concerned discuss the distinguishing features of the Powell case under somewhat similar circumstances as those here presented: *Prescott v. State*, 37 P. (2d) 830, 833, 56 Okla. Crim. 259; *Wilson v. Lanagan*, 19 F. Supp. 870, 873; *Shores v. United States*, 80 Fed. (2d) 942, 945.

It seems evident under the rule of the Powell case that where a trial court has appointed counsel

to represent a man charged with a capital offense either in accordance with the statutes of a given state or in accordance with the mandate of the decision in the Powell case, that the question as to whether or not the particular appointment is within or beyond the objections therein delineated depends upon the facts and circumstances of each individual case.

This being true, it is submitted that the present case may readily be distinguished from the Powell case in that the facts here involved are substantially different in detail from those upon which the Court bases its conclusion set forth in the opinion in that case.

Here counsel were definitely appointed by the court (R. 1) and not appointed in a casual fashion as in the Powell case.

Here the defendant is not a mere youth but was thirty-two years of age at the time of his trial (R. 9).

Here no hostile sentiment prevailed at the trial. As a matter of fact, the nature of the case clearly precludes any such inference.

Here no racial question was involved. The killing was by a negro man of his wife, a negro woman.

Here the crime had occurred more than four years from the date of the trial. This also tends to

reveal the utter lack of public interest which must have existed at the time of the trial.

Here the defendant was not haled back and forth under guard of soldiers nor is there any indication that any military forces were present during the trial of the case.

Here the defendant was not charged with an atrocious crime calculated to arouse the community at large. The murder had long since been committed at the time of this trial.

Here the defendant was a resident of the county in which he was tried. It is not shown that he had no friends or family in the county but, on the contrary, it appears that his brothers were present in the community (R. 33).

Here the defendant was not imprisoned immediately following the commission of the crime but was at large for more than three years during which time it must be presumed that he had full opportunity to contemplate his crime and to secure witnesses if any had existed.

It is stated in the motion for continuance and motion for new trial that the defendant is of low mentality but this appears rather from statements made by counsel,—obviously in an attempt to bring this case within the facts of the Powell case —than from any evidence adduced on the trial of the case or on the hearings of the several motions presented.

It appears therefore that the only question here presented for decision, is whether the time between appointment of counsel in the present case and the date set for trial was of such short duration as to prevent counsel from adequately preparing a defense. A determination of this question can only be had after the consideration of all the facts and circumstances surrounding the appointment of counsel and the setting of the date for trial for we do not believe that this Court will announce as a hard and fast rule that two, three or five days must intervene between the appointment of counsel and the date of trial.

(2)

The Trial Court did not abuse its discretion in failing to continue the case.

This Court has on numerous occasions determined that the granting or denial of a continuance are matters within the discretion of the Trial Court and are reviewable only in those instances where a gross abuse of discretion appears from the record.

In *Franklin v. State of S. C.*, 218 U. S. 161, 168, the defendant, a citizen of the negro race, was convicted in South Carolina of the crime of the murder of a white man and was sentenced to suffer the death penalty. The appeal was from a decision of the Supreme Court of South Carolina affirming the judgment of the Court of General Sessions of that State. One of the points raised on the appeal to this court was the denial of a continuance asked

for because, as alleged, counsel for accused had not had sufficient time or opportunity to prepare for his client's defense. In discussing the merits of this contention and in sustaining the ruling of the Supreme Court of South Carolina, holding that there had been no denial of due process by such refusal, the Court speaking through Mr. Justice Day, states:

> "It is next contended that the plaintiff in error was denied due process of law in the refusal of the court to continue his case when the same was called for trial. *It is elementary that the matter of continuance rests in the sound discretion of the trial Court, and its action in that respect is not ordinarily reviewable. It would take an extreme case to make the action of the trial court in such a case a denial of due process of law.*" (Emphasis supplied)

In *Isaacs v. United States*, 159 U. S. 487, 489, where Isaacs, a Cherokee Indian, who was convicted of the murder of a white man in Indian country, appealed to this Court and assigned as error the action of the Court in overruling his motion for continuance, requested because of the absence of a material witness for the defense, the court stated:

> "That the action of the Trial Court upon an application for a continuance is purely a matter of discretion, and not subject to review by this court, unless it be clearly shown that such discretion has been abused is settled by too many authorities to be now open to ques-

tion. Woods v. Young, 4 Cranch, 237; Barrow v. Hill, 13 How. 54; Crumpton v. United States, 138 U. S. 361; Cox v. Hart, 145 U. S. 376; Earnshaw v. United States, 146 U. S. 60, 68; Means v. Bank of Randall, 146 U. S. 620. It appears that forty-nine days before the case was called for trial, an application was made and granted to have the witness whose testimony was desired, summoned at the expense of the government, the affidavit showing that she was within the jurisdiction of the court. It was not shown that any diligence was used to procure the attendance of the witness; or that any attachment was asked for, although the trial continued for several days, or why the subpoena was not served. The affidavit did not show that the defendant could not make the same proof by other witnesses, or that he could not safely go to trial without the testimony of the witness in question. In fact, all that the affidavit showed that the witness could prove was established by other testimony, including that of the defendant himself. There was clearly no abuse of discretion."

The foregoing conclusions were concurred in by this court in *Goldsby v. United States*, 160 U. S. 70, 72. See also *Gilmore v. United States*, 268 F. 719, 721. It does not appear that this view has ever been departed from or that these cases have been overruled.

The question then presents itself whether there has been such a gross abuse of discretion in the pres-

ent case as to justify this Court in overturning the action of the Trial Court and declaring that such action was a denial of due process of law to the defendant? In considering whether there was such an abuse by the Trial Court, we submit that this Court should consider the fact that the Trial Court was present at the time of the hearing on the motion for continuance (if such a hearing was had) and the amended motion for new trial.

The Court was familiar with all of the attendant circumstances. The Court saw the defendant and talked with him on arraignment and was as able to judge of his mentality and his ability to aid counsel, as counsel themselves. The Court knew of the cases pending on his docket and whether the defense attorneys were actually and indispensably needed in court for the trial of cases from the day of their appointment to the day the Avery case was called for trial. The Court knew the weather conditions during the period from March 21 to March 24, and was in the position to judge whether the defense attorneys were hampered in their investigation of the merits of the case because of the inclemency of the weather. The Court knew the imminence of the adjournment of the court, the length of time which would elapse before the next meeting of the court, the reluctance of the defendant to submit to trial and all the one thousand and one other matters that occur to an experienced trial judge when a motion for continuance is presented to him for his ruling.

There can be no doubt that it was the realization of the fact that the Trial Court was in such a favorable position with reference to the question that led this Court to the adoption of its position that only in cases of gross abuse of discretion would a denial of continuance be reviewed.

Let us recall for a moment, the facts which were presented to the Trial Court on the motion for continuance and the amended motion for new trial, and let us at the same time examine those matters which counsel failed or was unable to present.

By affidavit and oral testimony, the Court was told by Mr. Foshee that he was appointed at two o'clock on March 21, 1938, and that at the time he was appointed to defend Lonnie Avery he was going into the trial of another case and was engaged in this case until about nine P. M. on March 21st; that he had other cases on the docket which required his presence in the court room on the 22nd of March and was also detained in court on the 23rd day of March, waiting for Lonnie Avery's case to be called (R. 56); that he could get no information from the defendant, although he conferred with him on Monday or Tuesday, for the reason that the defendant was illiterate and had not the mind of even an eight year old child; and finally, that he was unable to visit the scene of the crime for the reason that it was raining.

The Trial Judge, it is submitted, having been in attendance upon court during the period from

March 21st to March 24th, the day on which the motion for continuance was submitted, certainly was in a position to know, especially when it is remembered that the scene of the trial was a small town with few lawyers—not comparable to a large metropolitan court where lawyers are in and out at all times and some of them may not be known personally to the judge,—of the necessity for counsel being in attendance upon court or of his inability to visit the scene of the crime because of the inclemency of the weather. It must be presumed that the court determined that defense counsel had ample opportunity to investigate the merits of the case. No showing is made that counsel, Mr. Foshee, was engaged in the trial of cases during the nights of March 22nd nor March 23, 1938, and we know of no immutable rule of law prohibiting counsel employed in the defense of a client charged with murder from working at night on such case.

The same may be said of the affidavit and testimony of counsel, Fred G. Wood, the other attorney appointed for defendant. According to his own affidavit, his last case "was disposed of about 4:30 o'clock on the afternoon of March 22, 1938." (R. 7). Even assuming for the sake of argument that appointed counsel Foshee was so occupied in the trial of cases as to be prevented from making an investigation of the Avery case, counsel Wood, according to his own affidavit, had at least forty-eight hours to investigate the case. It has been held in a number of cases that there was no abuse of discretion by the Trial Court in denying a motion for con-

tinuance because of the engagement of counsel in another court, even though the absent counsel was the leading attorney in the case, where, it is shown that other counsel was associated with him in the case and was competent to handle it. Brock v. So. & No. R. Co., 65 Ala. 79; Birmingham v. Goolsby, 227 Ala. 421, 150 So. 322. See many other cases collated in the extensive annotation in 112 A. L. R. 594, 600.

Defense counsel in their affidavits and testimony indicate that witnesses which they might have been able to secure would have testified regarding the truth and veracity of witnesses for the State and of the defendant's character (R. 34), although none were found—even during the long period between the end of the trial and the date of the hearing on the motion for new trial. In *People v. Trimble*, 177 N. E. 696, 345 Ill. 82, 86, the Supreme Court of Illinois refused to reverse the trial court's ruling denying application for continuance solely on the ground of want of preparation of counsel and particularly the lack of opportunity to secure the attendance of character witnesses. The Court there states:

> "The only purpose for which a continuance under his affidavit was shown could have been justified was to secure the attendance of character witnesses. The trial began four days after the arraignment, but both plaintiff in error and his counsel had full reason to believe for some months that the indictment would be

returned. * * * So far as the record shows it would seem that in the four days intervening between arraignment and trial, plaintiffs in error's counsel could have procured the attendance of character witnesses from St. Louis. There was no showing of any attempt to do so. The denial of the continuance on the ground of want of preparation of counsel was not such an abuse of discretion under all the facts in this case as to require a retrial."

Again in *Butler v. State*, 288 S. W. 218, 105 Tex. Cr. App. 228 the Court held that there was no abuse of discretion shown in denying continuance for character witnesses. The Court there stated:

"The rule is that if the trial court in the exercise of his sound discretion, refuses a continuance sought only to secure proof of the good character of the defendant, such ruling will not ordinarily cause a reversal. Duncan v. State, 30 Tex. App. 1, 16 S. W. 753; Yarbrough v. State, 66 Tex. Cr. Rp. 324, 147 S. W. 270. We think there was no abuse of the court's discretion shown in this matter."

There is also an indication that had defendant had the opportunity he could have procured witnesses to testify as to his mental capacity but that because he was denied an opportunity to prepare for trial, his counsel were unable to interview witnesses regarding his sanity (R. 34, 35). It was admitted by defense counsel that there were four

practicing physicians in Centerville, all active in their practice and that they, in all probability, would answer a call at night. Under the Alabama law, as stated in *Rhodes v. State*, 168 So. 869, 232 Ala. 509, a regular practicing physician has been held qualified to express an opinion on the question of sanity. The court in the Rhodes case, stated:

> "From our early judicial history a regular practicing physician has been held qualified to express an opinion on the question of sanity to be accorded greater weight than that of a non-expert witness. McCurry v. Hooper, 12 Ala. 823, 46 Am. Dec. 280; 22 C. J. page 668, Section 759.
>
> "Medical jurisprudence is now one of the subjects on which examination is had before issuing license to practice medicine. Code, Section 2837 (1627)."

We submit that counsel were aware of the Rhodes opinion, and that the Trial Court, also knowing of the Rhodes opinion, treated the contention that a continuance should have been granted in order to permit inquiry into sanity vel non of the defendant with that case in mind. Here again attention may be directed to the fact that, although three months or more expired between the conclusion of the trial and the hearing on the amended motion for new trial, no witnesses were brought forward at the latter date to testify that the defendant was insane or even that he was of low mentality. It has been frequently held by

the Supreme Court of Alabama as well as by courts of last resort of other states that the refusal of a continuance on the ground that insufficient time is available to ascertain facts as to the insanity of the defendant or of his family rests within the discretion of the Trial Court and will not be reviewed in the absence of gross abuse of discretion.

Jarvis v. State, 126 So. 127, 220 Ala. 501;

Peterson v. State, 166 So. 20, 231 Ala. 625;

State v. Chandler, 119 S. E. 774, 126 S. C. 149

State v. Miller, 32 P. (2d) 535, 177 Wash. 442.

In the last cited case, *State v. Miller*, one of the reasons advanced by the Supreme Court of Washington for sustaining the Trial Court in refusing to grant defendant's motion for new trial based on the refusal of a motion to continue was that:

> "No showing is made that, even though he had had more time within which to prepare his case, he could have procured other or abler expert witnesses to testify for him."

THERE WAS AMPLE OPPORTUNITY FROM THE DATE ON WHICH THE TRIAL WAS CONCLUDED UNTIL THE DATE ON WHICH THE AMENDED MOTION FOR NEW TRIAL WAS PRESENTED TO THE TRIAL COURT, FOR DEFENDANT TO HAVE DIS-

COVERED AND PRESENTED TO THE TRIAL JUDGE ANY EVIDENCE IN HIS FAVOR OF WHICH HE WAS DEPRIVED BY THE UNFAMILIARITY OF HIS APPOINTED COUNSEL WITH THE CASE AND FAILING IN PRESENTATION OF SUCH EVIDENCE, PETITIONER SHOULD NOT NOW BE HEARD TO COMPLAIN THAT DUE PROCESS WAS DENIED.

There is yet another reason why this Court should not conclude that there was such a gross abuse of discretion by the Trial Court as to constitute a denial of due process of law in the instant case.

As we have hereinabove noted, although the trial of the Avery case was concluded on March 24, 1938, the amended motion for new trial was not presented to the Trial Court nor ruled upon until June 30, 1938, more than three months after the trial of the case, Isn't it reasonable to assume that if there had been testimony available to the defendant to cast any doubt upon his guilt, or if the defendant was insane, or even if he were of such low mentality as to raise a reasonable doubt of his capacity to commit the crime, or if there were character witnesses or any other witnesses to the crime, defendant's counsel would have been able to produce them during the more than three months period which so elapsed? No newly discovered evidence was presented to the Trial Court at the time of the hearing on the amended motion for new trial. The statement by Mr. Justice Gardner of the Supreme

Court of Alabama in his able opinion, concurred in by all the Justices, that "the record discloses that the difficulty under which counsel labored related to the lack of material on which to base a defense, rather than any mere matter of time" in our judgment adequately sums up this point. Not one mitigating circumstance was brought to light although for aught that appears of record counsel had ample time for investigation.

In *Smith v. State*, 21 S. W. (2d) 400, 403, 159 Tenn. 674, the court found that the verdict had been returned on October 4, 1928, and that the motion for new trial was not submitted until October 27th, more than three weeks elapsing. The Supreme Court of Tennessee, in considering the propriety of the Trial Court's ruling denying defendant's motion for continuance stated:

> "This was ample time for the plaintiff in error to have discovered and presented to the Trial Judge any evidence in his favor of which he was deprived by the unfamiliarity of his appointed counsel with the case. The fact that no such evidence was presented to the Trial Judge is convincing that nothing was overlooked. We think, therefore, that it appears affirmatively from the record that no prejudice resulted to the plaintiff in error from the fact that he was represented by counsel appointed on the day the trial was begun. * * *"

Nor does this Tennessee case stand alone in its reasoning.

The Supreme Court of Nebraska has had before it a similar question and treated it as follows in *Smith v. State*, 241 N. W. 750, 123 Neb. 17:

> "A motion for a new trial was filed in the case, which was overruled on October 5, 1931, more than three months after the trial. *The defendant makes no showing at that time of newly discovered evidence, and we fail to see wherein the defendant was prejudiced by a denial of a continuance. It would seem that due diligence would require that he should secure any evidence that might be available to him within the period which elapsed after the trial.* Where there is no showing of newly discovered evidence which he was not able to obtain at the time of the trial, we are unable to say that he was prejudiced by reason of the denial of the continuance. *It would be a futile gesture, inconsistent with the present trend of judicial opinion, to reverse a judgment and remand a case because a continuance for preparation was denied by the trial court, where, so far as the record shows, it would be tried again on the same evidence.* Taking into account all the facts and circumstances presented by the record, the denial of the defendant's motion for a continuance was not an abuse of discretion." (Emphasis supplied)

The same may be said of the case now before this Court. Although counsel had more than three months in which to present additional evidence to the Court, no evidence seems to have been found and we submit that it is an understatement to say that it would be a futile gesture to reverse this case and send it back to the Circuit Court of Bibb County to be again tried on the same evidence when from all appearances such will be the result of a reversal.

There are numerous other cases decided by the courts of last resort throughout the country holding that before the refusal of a Trial Court to grant the accused a continuance will amount to reversible error its ruling must be a palpable error without the correction of which manifest injustice will be done. All of these cases seem to turn on whether or not the defendant has, in fact, been injured in his substantial rights by the action of the Trial Court in refusing to grant the continuance. For the convenience of the Court, we here point out what we believe to be a fairly comprehensive index of the trend of American decisions on this question.

The Supreme Court of Florida in the case of *Jarvis v. State*, 156 So. 310, 115 Fla. 320, in holding that the ruling of the Trial Court on motion for a continuance did not constitute a clear abuse of discretion and, therefore, that the case would not be reversed because of the refusal to grant such continuance, stated:

"Counsel's mere statement in their motion that they did not have time to prepare the defense is not sufficient. No facts are given on which to base such a statement. Nothing is said as to the character of defense and the complex nature of it that will require more time nor is anything said about witnesses and what was expected to be established by them nor that the accused himself depended upon any named witnesses not within the jurisdiction of the court by whom he expected to prove the character of the act by which the life of the woman was taken."

In *Birmingham v. State*, 96 S. W. (2d) 773, 192 Ark. 1095, the appeal was predicated upon the failure of the Trial Court to grant a continuance because the appellant, being tried for the crime of larceny, was placed on trial two days after being arrested, during which time he was confined in jail without opportunity to discuss his case with his attorneys, and that the attorneys when the case was called had had no opportunity to talk with the witnesses. The court stated:

"The record is silent as to the disposition of this motion (motion for continuance) but it is stated in the appellant's brief that the motion was overruled. Whether or not exceptions were saved to the alleged action of the court we are not advised.

"This court has always been reluctant to interfere with the discretion of the trial court in matters relating to continuances. A presiding judge, from personal observation, is familiar with the attendant circumstances, and has the best opportunity to form a correct opinion upon the case presented, and is presumed to have in mind his duty to properly protect the interests of the accused as well as the rights of society. In reviewing his action, there is much to be considered—the imminence of an adjournment of the court, the length of time which will elapse before the court will sit again, the number of witnesses in attendance, the reluctance of defendants to submit to trial, and the shifts often employed to escape or delay justice. Therefore, to be reversible error, the refusal to grant continuance must be a palpable error without the correction of which manifest injustice will be done. As is said in Loftin v. State, 41 Ark. 153: 'It must be a flagrant instance of the arbitrary or capricious exercise of power by the circuit court, operating to the denial of justice, that will induce us to interfere.'"

In *Allen v. State*, 262 N. W. 675, 129 Neb. 722, the Supreme Court of Nebraska treats the question of the necessity for the granting of a continuance in a criminal case as follows:

"As stated herein, there was no showing of prejudice either at the time the motion for

continuance was presented and denied or on the motion for new trial. It would be futile and unwarranted to reverse the judgment here if on another trial the evidence would be the same. The necessity for a continuance in a criminal case must be determined from the facts and circumstances presented, and a denial is not reversible error unless it appears from the record that the defendant was prejudiced thereby."

In another case which reached the Supreme Court of Nebraska, wherein one Smith was charged with the offense of statutory rape, it was insisted that the case should be reversed because of the refusal of the Trial Court to grant a continuance. The court concluded (*Smith v. State*, 257 N. W. 59, 127 Neb. 776):

"There is no showing in the motion for new trial that there is any evidence which the defendant was not able to procure. The record does not disclose that the rights of the defendant were prejudiced by a denial of the continuance. It is within the sound discretion of the Trial Court to determine under all circumstances of a particular case whether a continuance is required in the interest of justice. The ruling of the Trial Court thereon is not reversible error *unless an abuse of discretion is shown which is prejudicial to the defendant.*" (Emphasis supplied)

In *James v. State*, 196 P. 1045, 27 Wyo. 378, the Supreme Court of Wyoming dealt with the contention that the Trial Court should have granted a continuance upon the ground that the defendant's counsel had not had time to investigate and prepare the case for trial. The court stated:

> "It must be admitted that considering the seriousness of the charge, the time for preparation was short, but whether too short the trial court was much better able to judge than are we, and we cannot hold that it was in error in denying the motion, unless it appear that such action constituted an abuse of discretion. Robinson v. State, 18 Wyo. 216, 106 Pac. 24. From the later events of the prosecution, it appears that all persons having any knowledge of facts material to the case were present as witnesses at the trial, *and no suggestion is made of any additional evidence that could have been procured, or any reason why a better defense could have been made if the case had been continued.* See State v. Chitman, 117 La. 950, 42 So. 437. We would not be inclined on this ground alone to disturb the judgment in this case."

In *Fuson v. Commonwealth*, 251 S. W. 995, 996, 199 Ky. 804, the court states in part:

> "It is not shown that they (the defendants) were prejudiced by haste, *or would have been benefited by an extension of time*, and we are, therefore, unable to say that their substantial

rights have been prejudiced in this way." (Emphasis supplied)

In two other Kentucky cases, *Mitra v. Commonwealth*, 5 S. W. (2d) 275, 224 Ky. 13, and *Smith v. Commonwealth*, 128 S. W. (2d) 590, 278 Ky. 385, the Court of Appeals of Kentucky reiterates the rules hereinabove stated. In *Mitra v. Commonwealth*, the Court states:

> "Appellant admitted that he killed George, and he gave a detailed statement of the facts surrounding the killing. Learned counsel was in a position to place himself in possession of all of these facts in much less time than the court gave him. What preparation he expected to make in the way of defense, we do not know, but an attorney should play the cards that are dealt him and that is all that the law requires of him. His client was the dealer, and the attorney is not responsible for the cards that he holds."

In the *Smith v. Commonwealth* case, the Court refused to hold that the Trial Court was in error in denying defendant's motion for continuance for the reason that "the names of no witnesses were given nor was there any showing what any would state nor other showing as to necessity of continuance."

In *People v. Gray*, 249 N. W. 501, 264 Mich. 155, the Supreme Court of Michigan refused to

reverse a conviction for assault with dangerous weapon with intent to rob because of the denial of the motion for extension of time to prepare for trial where no prejudice was shown, the Court stating:

> "It does not appear defendant would have been in any better position for trial ten or sixty days from June 24. No prejudice is shown to have resulted from a speedy and public trial."

A similar conclusion was reached by the Supreme Court of Illinois in the case of *People v. Dale*, 189 N. E. 269, 270, 355 Ill. 330, the Court stating:

> "Time to prepare for trial does not include time to concoct a non existent defense but only such time as may be necessary and reasonable for the preparation and presentation of whatever defense the defendant has."

In *People v. Norman*, 2 N. E. (2d) 891, 893, 364 Ill. 28, Mr. Justice Orr speaking for the court stated:

> "Before a judgment of conviction will be reversed because of denial of motion for a continuance based upon lack of time to prepare for trial, it must appear that the refusal of additional time in some manner embarrassed the accused in preparing his defense and so prejudiced his rights. People v. Kunowiski, 360 Ill. 416, 196 N. E. 524. It is only where the record shows that the Trial Court has abused

its discretion that a reviewing court will interfere."

The Supreme Court of Texas has also touched on the question. In *McKenzie v. State*, 11 S. W. (2d) 172, 177, 116 Tex. Cr. 395, the Court states:

> "The reasons asserted in the application (for continuance) relative to the lack of preparation of applicant's attorneys, and their inability to secure material testimony for his defense do not make it apparent that, in the time allowed, applicant's attorneys were unable to properly prepare for trial * * *. Applicant fails to suggest in his motion the nature of the defense which he expected to interpose. There were few eye witnesses to the transaction which resulted in the homicide and it is manifest from an examination that it would have consumed but little time to have talked to the witnesses and learned the facts within their knowledge concerning the homicide. Considering the application in the light of the evidence * * * we find no abuse of discretion on the part of the trial court in overruling the motion."

The Supreme Court of Ohio has treated the question at length in *Stoyle v. State*, 165 N. E. 596, 32 Ohio App. 133, concluding:

> "The rule in this state seems to be settled as to the question of the continuance of a case where it is claimed a failure to do so is preju-

dicial to the rights of the applicant. We need but quote the case of Holt v. State, 11 Ohio St. 691: 'An application for the continuance of a case, is addressed to the sound discretion of the court, and its action cannot be reversed on error, unless it clearly appears, from all the facts and circumstances, that there has been an abuse of the discretion, *operating to the prejudice of the party, in the final determination of the case;* when it may be a proper ground to order a new trial. When the evidence in the case is not set out, so as to enable the appellate court to say that there has been such abuse of discretion, and prejudice to the party, it will not interfere." (Emphasis supplied)

And the Supreme Court of Washington in a prosecution for murder in *State v. Mahoney*, 208 P. 37, 120 Wash. 633, in sustaining the action of the Trial Court in refusing an application for continuance to enable defendant's counsel to qualify themselves to properly defend the defendant, reached a similar conclusion, based upon the fact that the defense was ably conducted and no showing was made that the defendant failed to secure all testimony in his favor which was procurable.

See also *Weems v. State*, 182 P. 264, 16 Okla. Cr. 198; *State v. Geo. Whitfield*, 175 S. E. 93, 206 N. C. 696; *Sims v. Commonwealth*, 115 S. E. 382, 386, 134 Va. 736; and *Commonwealth v. Tolarico*, 177 Atl. 1, 317 P. St. 481, 484.

(3)

Snyder v. Massachusetts

We feel that no discussion of due process of law and its application to a criminal case would be complete without including the recently decided case of *Snyder v. Massachusetts*, 291 U. S. 97. It is earnestly submitted that the opinion in that case imposes an impregnable barrier between the facts in the Powell case and those here at hand. It is submitted that when the language of the Snyder case is applied to the facts in the instant proceeding there can remain no further doubt regarding whether due process of law was granted to the defendant in this case, but that this Court must conclude that the defendant was deprived of no essential right by the Court below.

The question was presented to this Court in the Snyder case as to whether a view by the jury of a scene of a crime, in the absence of a defendant who had made demand that he be present, was a denial of due process under the Fourteenth Amendment. In that case the defendant was convicted of having shot to death one James M. Kiley at a gasoline station in Massachusetts. At the opening of the trial there was a motion by the Commonwealth that the jury be directed to view the scene of the crime. This motion was granted but the request of counsel for Snyder that he, Snyder, be permitted to view the scene with the jury was denied. Mr. Justice Cardozo, in speaking for the Court, stated:

"So far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process *to the extent that a fair and just hearing would be thwarted by his absence and to that extent only.*" (Emphasis supplied)

The Court then proceeds to a discussion of the point involved, making the following very pertinent observations:

"What we are subjecting to revision is not the action of the Legislature excluding a defendant from a view at all times or in all conditions. What is here for revision is the action of the judicial department of a state excluding the defendant in a particular set of circumstances, and the justice or injustice of that exclusion must be determined in the light of the whole record."

Applying the foregoing statement to the instant case, it may well be paraphrased as follows:

"The question presented to this Court is not the action of a Legislature denying the right of defendant to counsel or of denying to counsel time for preparation at all times and in all conditions. What is here for revision is the action of the Judicial Department of a State (the Circuit Court of Bibb County, Alabama) denying the defendant a continuance under a particular set of circumstances, and the justice or injustice

of that denial must be determined in the light of the whole record."

Counsel for petitioner insists that his complaint is not, solely, "of the commission of mere error but of a wrong so fundamental that it made the whole proceedings a mere pretense of a trial and rendered the conviction and sentence wholly void." (Petitioner's brief, p. 17.).

Again referring to the case of *Snyder v. Massachusetts*, supra, we note the following language:

"True indeed it is that constitutional privileges or immunities may be conferred so explicitly as to leave no room for an inquiry whether prejudice to a defendant has been wrought through their denial * * *. But here, in case at hand, the privilege, if it exists, is not explicitly conferred, nor has the defendant been denied an opportunity to answer and defend. The Fourteenth Amendment has not said in so many words that he must be present every second or minute or even every hour of the trial. If words so inflexible are to be taken as implied, it is only because they are put there by a court, and not because they are there already, in advance of the decision. *Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results.*" (Emphasis supplied)

Again applying the Court's words to the case at hand and paraphrasing them:

> "In this case, the privilege, if it exists, of the right of counsel to a specific period of time in which to prepare the defense has not been explicitly conferred. The Fourteenth Amendment has not said in so many words that counsel must have an hour, a day, three days, a week, two weeks, a month, or a year in which to prepare for trial. If words so inflexible are to be taken as implied, it is only because they are put there by a court and not because they are there already in advance of the decision. Due process of law requires that the proceedings shall be fair, but fairness is a relative not an absolute concept. It is fairness with reference to particular conditions or particular results."

It is submitted, therefore, that basing its determination on the rules that "the fairness required under due process of law is a relative and not an absolute concept", and that "the fairness required under due process of law must be measured by the particular conditions or particular results," the Court cannot in the case now presented to it hold that the Powell case is here applicable or that the petitioner was denied due process of law. To so hold would be to send this case back to the Circuit Court of Bibb County, Alabama, with instructions that it be retried upon the same evidence upon which it was originally tried, for from aught that appears from the record there is no other available evidence.

Here it will be pertinent to recall the words of Mr. Justice Cardozo in the case of *Snyder v. Massachusetts*, supra.

> "A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence."

It is earnestly submitted, therefore, that this Court be not blinded by the "tyranny of labels" but that it be guided by the shining light given by the facts, which point to the inescapable conclusion that the Trial Court did not abuse its discretion in refusing to grant the continuance and that the defendant was not, by any action of that Court, denied due process of law.

(4)

Cases Cited By Petitioner

The only cases cited by counsel for petitioner in his brief, other than the Powell case, which has heretofore been discussed at length, in support of his contention that his client was denied due process of law, are those of *Brown v. Mississippi*, 297 U. S. 278, and *Johnson v. Zerbst*, 304 U. S. 458, and

other cases collated in 84 A. L. R. 544. It may be said both of the cases particularly named and those contained in the annotation to A. L. R. that in each of them only a very short time intervened between the appointment of counsel and the trial of the case and in almost all of them there are certain other mitigating circumstances demonstrating the impropriety of placing the defendant on trial on such short notice, which circumstances do not exist in the present case.

A reading of the case of *Brown v. Mississippi*, 297 U. S. 278, 80 L. Ed. 682, illustrates the inapplicability of the citation. True it is that in the course of the opinion the court makes the statements set forth on pages 15 and 16 of counsel's brief but these statements, we submit, must be applied to the particular facts which were presented to the court in that case, i. e., the admissibility of a confession of of guilt by the accused extorted by brutality and violence. Obviously, this denial of due process should not be permitted a place in the argument of this case when the facts are so widely divergent.

Johnson v. Zerbst, 304 U. S. 458, is authority merely for the conclusion that in a Federal Court, under the Sixth Amendment to the Constitution of the United States, one charged with a felonious crime is entitled to the assistance of counsel and that compliance with the Sixth Amendment is an essential jurisdictional prerequisite to a Federal Court's authority. It is further authority for the proposition that while the right to counsel may be

waived such waiver must be intelligently and competently entered and not as the result of ignorance of legal rights.

In *Commonwealth v. O'Keefe*, 298 Pa. 169, 173, 148 Atl. 73, the defendant was forced to trial on the day of arrest notwithstanding counsel's statement regarding the impossibility of being prepared for trial.

In *Schaffer v. Territory*, 127 P. 746, 14 Ariz. 329, counsel were employed on the 15th day of December and the case was set for trial on December 19. The court held that under the facts, first, that the defendant was entitled to a subpoena to produce witnesses, second, that subpoenas had issued for three such witnesses at the defendant's request and, third, that the return had not been made by the sheriff for the reason that he had not had time to serve the subpoenas and make the return, a denial of continuance was prejudicial to the rights of the defendant.

The cases of *State ex rel Turner v. Davis*, 9 Okla. Cr. R. 94; *People ex rel Burgess v. Risley*, 66 How. Pr. 67, and *Batchelor v. State*, 125 N. E. 773, 189 Ind. 69, 76, merely recite the rule that the defendant is entitled to reasonable opportunity to prepare for trial, in support of the conclusion reached that a person confined in jail should be given an opportunity to consult freely with counsel without disturbance.

In *State v. Collins*, 29 So. 180, 104 La. 629, and *Mitchell v. Commonwealth*, 7 S. W. (2d) 823, 225 Ky. 83, the decisions reached that the defendant was prejudiced, because of the denial by the court of his motion, were based on circumstances similar to those in the Powell case, to wit, mob scenes, general violence and other mitigating circumstances preventing a fair trial of the defendant at the time the case was heard.

The case of *State v. Poole*, 23 So. 503, 50 La. Ann. 449, is readily distinguishable. The court there says:

> "Had the accused been at liberty, under bond, so that he could have conferred freely with counsel who were appointed, and gone to the scene of action, and ascertained what evidence there was attainable in his favor, we would feel less like holding that the trial was unduly precipitate; *but in view of the fact that he was incarcerated in jail from the date of the homicide, and unable to see and confer with friends, or counsel whom the court had assigned for his defense*, it does seem to us that the hardship put upon him was unusually great, particularly in view of the fact that the indictment charged him with murder; that the jury found him guilty, without qualification; and that the trial judge sentenced him to death." (Emphasis supplied)

In this case Avery was at large for more than four years from the date of commission of the crime and had witnesses been available to support his

theory, it is certain that he could have procured them in that time, or at least have made a mental note of their identities so that he could advise counsel of them when and if he was brought to trial.

In *Reliford v. State*, 79 S. E. 1128, 140 Ga. 777, 778, counsel appointed by the court to represent the defendant on trial for his life were allowed ten minutes to confer before entering upon trial and, after conference, when they asked for continuance on the ground of lack of time to prepare the defense, their request was denied.

Further demonstrative of the inapplicability to the present case of those cases noted in the Powell decision and those noted in the A. L. R. Annotation cited by counsel are the cases of *McArver v. State*, 40 S. E. 779, 114 Ga. 514; *Sanchez v. State*, 157 N. E. 1, 199 Ind. 235, 246; *Jackson v. Commonwealth*, 287 S. W. 17, 215 Ky. 800. In the first case, the McArver case, defendant's counsel retired from the case on the day of the trial and defendant was put to trial on that same day, with appointed counsel acting for him. In the Sanchez case, an ignorant Indian was put to trial with an incompetent attorney. The court in holding him entitled to a new trial, cited facts readily illustrative of the error of the conviction. In the Jackson case, a negro was put to trial on Saturday with counsel appointed the same day.

The other cases cited by counsel for petitioner are equally inapplicable as even a casual reading will immediately reveal.

CONCLUSION

We conclude then that the laws of the State of Alabama afforded this petitioner due process of law, that the rules of procedure and practice applied to his case were the same as were applied to all persons charged with crimes of the same nature in the State of Alabama and the same are not unreasonable. Therefore, petitioner was not denied equal protection of the laws nor was he denied due process of law.

It is, therefore, respectfully submitted that this case should be affirmed.

Respectfully submitted,

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ATTORNEY GENERAL OF ALABAMA,
COUNSEL FOR RESPONDENT.

WILLIAM H. LOEB,
ASSISTANT ATTORNEY GENERAL.
ON THE BRIEF.

APPENDIX

ALABAMA CODE OF 1923

4524. INDICTABLE OFFENSES.—All felonies and misdemeanors, originally prosecured in the circuit court, are indictable offenses.

4526. CAPTION AND CONCLUSION.—An indictment must contain, in the caption or body thereof, the name of the state, county, court, and term in and at which it is preferred, and must conclude "against the peace and dignity of the State of Alabama."

4529. STATEMENT OF OFFENSE. — The indictment must state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment; and in no case are the words "force of arms" or "contrary to the form of the statute" necessary.

4556 (76). MURDER. A. B. unlawfully and with malice aforethought, killed C. D., by shooting him with a gun or pistol, etc. (or by striking him with an iron weight, or by throwing him from the top of a house, or by pushing him into the river, whereby he was drowned, etc., as the case may be.)

5202. OBJECTIONS TO INDICTMENT FOR DEFECT IN GRAND JURY; WHEN NOT AVAILABLE; EXCEPTIONS.—No objection can

be taken to an indictment, by plea in abatement or otherwise, on the ground that any member of the grand jury was not legally qualified, or that the grand jurors were not legally drawn or summoned, or on any other ground going to the formation of the grand jury, except that the jurors were not drawn in the presence of the officers designated by law; and neither this objection nor any other can be taken to the formation of a special grand jury summoned by the direction of the court.

5565. CASES SET FOR PARTICULAR DAYS; EXCEPTIONS.—It is the duty of the clerk of the circuit court to set for trial all criminal cases in his court, except capital cases, and cases of parties in custody, for particular days; and no case so set shall be called for trial before such day.

5567. WHEN COUNSEL APPOINTED FOR DEFENDANT IN CAPITAL CASE. — If the defendant is indicted for a capital offense, and is unable to employ counsel, the court must appoint counsel for him, not exceeding two, who must be allowed access to him, if confined, at all reasonable hours.

5568. SERVICE OF COPY OF INDICTMENT AND LIST OF JURORS ON DEFENDANT IN CAPITAL CASE.—If the defendant is indicted for a capital offense, a copy of the indictment and a copy of the venire for his trial, if a special venire is required for his trial, must be served on him, or on counsel appearing for him, at least one entire day before the day set for his trial.

8603. QUALIFICATIONS OF PERSONS PLACED ON JURY ROLL AND IN JURY BOX. —The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men, and are esteemed in the community for their integrity, good character and sound judgment, but no person must be selected who is under twenty-one or over sixty-five years of age, or, who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror, or who cannot read English, or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English, and has all the other qualifications prescribed herein and is a freeholder or householder, his name may be placed on the jury roll and in the jury box.

8616. DRAWING GRAND AND PETIT JURIES FROM JURY BOX.—At any session of a court requiring jurors for the next session, the judge, or where there are more than one, then any one of the judges of the court shall draw from the jury box in open court the names of not less than fifty persons to supply the grand jury for such session and petit juries for the first week of such session of the court, or if a grand jury is not needed for the session at least thirty persons, and as many more persons as may be needed for jury service in courts having more than one division for the first week, and after each name is drawn it shall not be returned to the jury box, and there shall be no selection of names, and must seal up the names thus

drawn and retain possession thereof, without disclosing who are drawn until twenty days before the first day of the session of the court for which the jurors are to serve, when he shall forward these names by mail, or express, or hand the same to the clerk of the court who shall thereupon open the package, make a list of the names drawn, showing the day on which the jurors shall appear and in what court they shall serve, and entering opposite every name the occupation of the person, his place of business, and of residence, and issue a venire containing said names and information to the sheriff who shall forthwith summon the persons named thereon to appear and serve as jurors.

8630. OBJECTIONS TO INDICTMENTS; HOW TAKEN.—No objection to an indictment on any ground going to the formation of the grand jury which found the same can be taken to the indictment, except by plea in abatement to the indictment; and no objection can be taken to an indictment by plea in abatement except upon the ground that the grand jurors who found the indictment were not drawn by the officer designated by law to draw the same; and neither this objection, nor any other, can be taken to the formation of a special grand jury summoned by the direction of the court.

8632. SPECIAL AND EXTRA TERMS OR SESSIONS: JURIES FOR.—Juries, grand and petit, for any special, adjourned, or extra term or session of any court requiring grand or petit juries, which have not been drawn by the judge of the court, may be drawn by the judge in term time, or vacation,

or the judge of the court may draw as many persons to serve as grand and petit jurors as he thinks necessary, and have them summoned as in cases where jurors are drawn to try capital cases.

8644. ORDER FOR SPECIAL VENIRE; DRAWING AND SUMMONING SPECIAL VENIRE.—Whenever any person or persons stand indicted for a capital felony, the court must, on the first day of the term, or as soon as practicable thereafter, make an order commanding the sheriff to sommon not less than fifty nor more than one hundred persons, including those drawn on the regular juries for the week set for the trial of the case, and shall then in open court draw from the jury box the number of names required, with the regular jurors drawn for the week, set for the trial, to make the number named in the order, and shall cause an order to be issued to the sheriff to summon all persons therein named to appear in court on the day set for the trial of the defendant, and must cause a list of the names of all the jurors drawn for the week in which the trial is set, and those drawn as provided in this section, together with a copy of the indictment, to be forthwith served on the defendant, by the sheriff, and the defendant shall not be entitled to any other or further notice of the jurors drawn for his trial nor of the charge or indictment upon which he is to be tried.

8650. COURT MAY FIX TRIAL OF CAPITAL CASE FOR ANY SUBSEQUENT DAY OF SESSION.—The court may, on any day of the ses-

sion, fix the time for the trial of any capital case or cases for any subsequent day of the session.

8665. GRAND JURIES; HOW AND WHEN EMPANELED.—There shall be empaneled in every county having less than fifty thousand population, not less than two grand juries in every year, and when they have completed their labors, in its discretion the court may permit them to take a recess subject to the call of the judge of the circuit court, or chief justice of the supreme court, and may be reassembled at any place where the circuit court of the county is to be held. In all counties having over fifty thousand population, there shall be empaneled not less than four grand juries in every year.

pp. 5+6+2

SUPREME COURT OF THE UNITED STATES.

No. 124.—October Term, 1939.

Lonnie Avery, Petitioner, *vs.* The State of Alabama.	On Writ of Certiorari to the Supreme Court of the State of Alabama.

[January 2, 1940.]

Mr. Justice Black delivered the opinion of the Court.

Petitioner was convicted of murder in the Circuit Court of Bibb County, Alabama; he was sentenced to death and the State Supreme Court affirmed.[1] The sole question presented is whether in violation of the Fourteenth Amendment "petitioner was denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial", because after competent counsel were duly appointed their motion for continuance was denied. Vigilant concern for the maintenance of the constitutional right of an accused to assistance of counsel led us to grant certiorari.[2]

Had petitioner been denied any representation of counsel at all, such a clear violation of the Fourteenth Amendment's guarantee of assistance of counsel would have required reversal of his conviction.[3] But counsel were duly appointed for petitioner by the trial court as required both by Alabama law[4] and the Fourteenth Amendment.

Since the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the fact, standing alone, that a continuance has been denied, does not constitute a denial of the constitutional right to assistance of counsel. In the course of trial, after due appointment of competent counsel, many procedural questions necessarily arise which must be decided by the trial judge in the light of facts

[1] — Ala. —, 188 So. 391.

[2] — U. S. —.

[3] Powell v. Alabama, 287 U. S. 45; see Brown v. Miss., 297 U. S. 278, 286.

[4] Code of Ala., 1923, Sec. 5567.

then presented and conditions then existing. Disposition of a request for continuance is of this nature and is made in the discretion of the trial judge, the exercise of which will ordinarily not be reviewed.[5]

But the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel.[6] The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.

In determining whether petitioner has been denied his constitutional right to assistance of counsel, we must remember that the Fourteenth Amendment does not limit the power of the States to try and deal with crimes committed within their borders,[7] and was not intended to bring to the test of a decision of this Court every ruling made in the course of a State trial.[8] Consistently with the preservation of constitutional balance between State and Federal sovereignty, this Court must respect and is reluctant to interfere with the States' determination of local social policy.[9] But where denial of the constitutional right to assistance of counsel is asserted, its peculiar sacredness[10] demands that we scrupulously review the record.[11]

The record shows—

Petitioner was convicted on an indictment filed in the Bibb County Circuit Court for murder alleged to have occurred in 1932. He was found and arrested in Pittsburg, Pennsylvania, shortly before March 21, 1938. On that date, Monday, he was arraigned at a regular term of the Court; two practicing attorneys of the local bar were appointed to defend him; pleas of not guilty and not guilty

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[5] Franklin v. South Carolina, 218 U. S. 161, 168; Isaacs v. United States, 159 U. S. 487, 489; see Minder v. Georgia, 183 U. S. 559, 561.

[6] Cf. Powell v. Alabama, *supra*; Moore v. Dempsey, 261 U. S. 86, 91.

[7] Leeper v. Texas, 139 U. S. 462, 467-8; Ughbanks v. Armstrong, 208 U. S. 481, 487; Minder v. Georgia, *supra*, 562.

[8] Cf. Davidson v. New Orleans, 97 U. S. 96, 104; Walker v. Sauvinet, 92 U. S 90, 92.

[9] Green v. Frazier, 253 U. S. 233, 239, 240, 242; Nebbia v. New York, 291 U. S. 502, 537-8.

[10] Cf. Lewis v. United States, 146 U. S. 370, 374, 375.

[11] Norris v. Ala., 294 U. S. 587, 590; Pierre v. Louisiana, 306 U. S. 354, 358.

by reason of insanity were entered and the presiding judge set his trial for Wednesday, March 23. The case was not reached Wednesday, but was called Thursday, the 24th, at which time his attorneys filed a motion for continuance, on the ground that they had not had sufficient time and opportunity since their appointment to investigate and prepare his defense. Affidavits of both attorneys accompanied the motion.

One attorney's affidavit alleged that he had not had time to investigate and prepare the defense because he had been actually engaged in another trial from the time of his appointment at 2 P. M., Monday, until 9 P. M. that evening; his presence had been required in the court room on Tuesday, March 22, due to employment in other cases set, but not actually tried; he had been detained in court Wednesday, March 23, waiting for petitioner's case to be called; but after his appointment he had talked with petitioner and "had serious doubts as to his sanity."

The affidavit by the other attorney stated that he too had not had proper time and opportunity to investigate petitioner's case because of his employment in other pending cases, some of which were not disposed of until Tuesday at 4:30 P. M.

No ruling on the motion for continuance appears in the record, but on Thursday, the 24th, the trial proceeded before a jury.

The foster parents of the person whose murder was charged and another witness testified that on the day of the killing, deceased, petitioner's wife from whom he was then separated, had started to a nearby neighbor's house to get a washtub when petitioner approached her with a pistol in his right hand; words ensued; she turned and ran and he shot her twice in the back; she fell and he shot her three more times. Petitioner denied that these witnesses were at the time in a position to see what occurred. Admitting he had come some three miles from his home to see his wife, he insisted that he had no pistol but that when he spoke to her she had a bucket of water and someting else; they quarrelled; she then drew a pistol from under her sweater and he "got to tussling with her over the pistol, trying to take it away from her"; "shot her, behind the shoulder, and through the back, tussling with her," and then ran away. There is no suggestion in the record that there were any witnesses to the killing other than those who testified. The plea of insanity apparently was withdrawn.[12]

[12] The opinion of the Supreme Court of Alabama notes: "Counsel first interposed a plea of not guilty, and another of not guilty by reason of insanity. But upon the trial withdrew the latter plea."

The jury returned a verdict of guilty with the death penalty. On the same day, the 24th, petitioner's counsel moved for new trial, setting up error in the failure to grant the requested continuance. This motion for new trial was continued from time to time until June 30. In the interim, a third attorney had been employed by petitioner's sister, and on June 30, petitioner's three lawyers filed an amendment to the motion for new trial, specifically setting out that the denial of a continuance had deprived petitioner of the equal protection of the laws and due process of law guaranteed by the Fourteenth Amendment, by denying him "the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial."

When the motion for new trial was heard the only witnesses were petitioner's three attorneys. The third attorney, employed by petitioner's sister, testified only that he had been employed after the trial and verdict. The two attorneys who had represented petitioner at the trial substantially repeated what they had set out in their original affidavits. In some detail they testified that: they had conferred with petitioner after their appointment on Monday, March 21, but he gave them no helpful information available as a defense or names of any witnesses; between their appointment and the trial they made inquiries of people who lived in the community in which the petitioner had lived prior to the crime with which he was charged and in which the killing occurred and none of those questioned, including a brother of petitioner, could offer information or assistance helpful to the defense; they (the attorneys) had not prior to the trial conferred with local doctors, of whom there were four, as to petitioner's mental condition, had neither summoned any medical experts or other witnesses nor asked for compulsory process guaranteed an accused by the Alabama Constitution, Art. 1, Sec. 6. And in response to inquiries made by the trial judge they stated that they had not made any request for leave of absence from the court to make further inquiry or investigation.

The motion for new trial was overruled.

Upon appeal, the Alabama Supreme Court gave full consideration to the motion for continuance although no ruling upon it was contained in the record and concluded that the trial court had not abused its discretion in failing to continue the case.[13]

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[13] Avery v. State of Alabama, *supra*.

Under the particular circumstances appearing in this record, we do not think petitioner has been denied the benefit of assistance of counsel guaranteed to him by the Fourteenth Amendment. His appointed counsel, as the Supreme Court of Alabama recognized, have performed their "full duty intelligently and well." Not only did they present petitioner's defense in the trial court, but in conjunction with counsel later employed, they carried an appeal to the State Supreme Court, and then brought the matter here for our review. Their appointment and the representation rendered under it were not mere formalities, but petitioner's counsel have—as was their solemn duty—contested every step of the way leading to final disposition of the case. Petitioner has thus been afforded the assistance of zealous and earnest counsel from arraignment to final argument in this Court.

The offense for which petitioner was convicted occurred in a County largely rural. The County seat, where court was held, has a population of less than a thousand.[14] Indictments in the Bibb County Circuit Court, as in most rural Counties throughout the Nation, are most frequently returned and trials had during fixed terms or sessions of court.[15] And these rural "Court Weeks" tra-

[14] Vol. I, Fifteenth Census of the United States, 1930.

[15] The first Constitution of Alabama (1819), Art. V, Sec. 7, provided for the holding of a circuit court at least twice a year in each county, and this provision continues in the present constitution, Const. of Ala. (1901) Art. VI, Sec. 144. While in recognition of modern social needs (see Pound, Criminal Justice in America, 1930, pp. 152, 88, 150, 163, 164, 178, 183, 189, 190) circuit courts now, by statute, entertain causes at substantially all times (Code, 1923, Sec. 6667, as amended) the holding of formal court at specific terms or sessions is emphasized in the requirement that each cause be called at least twice a year and as often as is necessary to secure prompt trials. (*Id.*, Sec. 6668). Cf. Ala. Civ. Code, 1907, c. 62, Art I, Sec. 3234, specifically providing for holding of circuit court in Bibb County on the first Monday before the last Monday in February and August of each year. In general, the practice in Alabama accords with that in all sections of the country, e. g., see Compiled Laws of Colorado, 1921, Sec. 5656, *et seq.*, fixing specific terms of district courts, and Sec. 5734-5766, fixing specific dates of county court terms; Idaho Code Ann. (1932) 1-706, *et seq.*, requiring at least two terms each year for the district court in each county, to be fixed by court order; Burns Indiana Stat. Ann. (1933) 4-332, *et seq.*, fixing specific terms of circuit courts, 4-407 *et seq.*, and 4-607, fixing specific terms of superior courts; Rev. Stat. of Maine (1930), c. 91, Sec. 21, p. 1264, fixing specific trial terms for superior courts; Mich. Stat. Ann. (Callaghan, 1938) § 27.546, *et seq.*, providing for at least four terms of circuit court in each county organized for judicial purposes, at fixed times subject to change by court order (§ 27.547); Cahill's Consol. Laws of New York (1930), c. 31, § 84, providing that special and trial terms of supreme court be designated by the appellate division (see also § 150) and requiring that at least one special term and two trial terms must be held in each county annually, § 148; Rev. Stat. of Utah (1933), 20-3-6, 20-3-9, requiring at least three terms during each year for the district court at each county seat, at times to be

ditionally bring grand and petit jurors, witnesses, interested persons and spectators from every part of the County into the County seat for court.[16] Unlike metropolitan centers, people in these rural Counties know each other, and information concerning witnesses and events is more widespread and more generally known than in large cities. Because this was so, petitioner's attorneys were able to make the inquiries during Court Week at the County seat, to which they testified, and that they apparently withdrew the plea of insanity after this inquiry is significant. That the examination and preparation of the case, in the time permitted by the trial judge, had been adequate for counsel to exhaust its every angle is illuminated by the absence of any indication, on the motion and hearing for new trial, that they could have done more had additional time been granted.

Under the circumstances of this case we cannot say that the trial judge, who concluded a fairly conducted trial by carefully safeguarding petitioner's rights in a clear and fair charge, deprived petitioner of his constitutional right to assistance of counsel. The Supreme Court of Alabama having found that petitioner was afforded that right, its judgment is

Affirmed.

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fixed by the respective district judges; Public Laws of Vermont (1933), Sec. 1374, p. 296, fixing stated terms for holding county courts. In Pennsylvania, courts of quarter sessions, "of oyer and terminer and jail delivery shall be holden four times, annually, in every county." 17 Purdon's Penn. Stat., §§ 331, 351, 371.

[16] The system of circuit court terms continues today characteristics traceable to the original English Assizes. While financial and administrative matters have been dropped from the business historically committed to justices on Eyre and later to judges of assize from the time of Henry II, our rural County Circuit courts still bear the earmarks of a "general review of the whole administration of the country." I Stephens, "His. of the Crim Law of Eng." (London), pp. 101, 106, 111, See, II Enc. of Soc. Sci., 283, 284, IV, 522. And the practice of promptly trying at any term all the then accused finds its historical roots in the commissions of gaol-delivery oyer and terminer of judges on Circuit or "Assize." I Stephen, *supra*, p. 105, *et seq.* These judges were empowered "to try every prisoner in the gaol, committed for any offense whatsoever." They proceeded upon prior indictments "as well as upon indictments taken before themselves." Stubbs's "Crown Circuit" (Dublin), 2, 5, 7, 9, 10. "And therefore it hath never been a question, but that the justices of gaol delivery may take an indictment, try, and give judgment the same day." 2 Hale's "Pleas of the Crown" (1st Amer. ed.), 33. The Sheriff was commanded to see that the prisoners "together with their attachments, indictments, and all other muniments any ways concerning those prisoners . . . [be present and that] all they, who will prosecute against those prisoners, be then and there to prosecute against them, as shall be just." Stubbs, *supra*, 4, 5. See 1 Holdsworth's "History of English Law" (1927), pp. 49-51, 264 *et seq.*